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A Barrister of the Supreme Court of New Zealand.

## VOLUME VIII.

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**BUTTERWORTH'S**  
*New Zealand*  
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**COURT OF APPEAL, SUPREME COURT,  
COURT OF ARBITRATION, and VALUATION COURT CASES.**

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**VOLUME VIII.**

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[IN THE COURT OF ARBITRATION.]

BRAYSHAY (INSPECTOR OF AWARDS) *v.*  
WELLINGTON HARBOUR BOARD.

COURT OF ARBITRATION. 1950. September 11; October 31. TYNDALL, J.

*Annual Holidays—Worker taking Whole of Annual Holiday before Conclusion of Qualifying Period—Worker voluntarily terminating Employment before Completion of That Period—Tacit Undertaking on Worker's Part to complete Year of Qualifying Service—Employer's Right to deduct Proportionate Part of Holiday Pay from Pay before Worker's Termination of Service—Annual Holidays Act, 1944, s. 3.*

Section 3 of the Annual Holidays Act, 1944, contemplates continuity of employment with one employer throughout the full year of qualifying service; and the employer, when agreeing to the taking of a holiday wholly in advance under the provisions of s. 3 (2), is justified in treating the completion of the year's service as an implied condition upon which he is entitled to rely before concurring in the proposal.

A worker was employed by the defendant Board as a hydraulic crane driver, and, for the purposes of the Annual Holidays Act, 1944, his qualifying year of service was to end on October 9, 1949. He took the whole of his two weeks' annual holiday in advance during the fortnight commencing March 21, 1949, and was paid two weeks' ordinary pay before the commencement of that holiday. On June 16, 1949, he voluntarily terminated his employment. At the end of the last complete pay period before that date, the Board deducted the sum of £5 2s. 1d. from moneys then due to the worker, and the justification for such deduction was claimed to be the fact that the worker had failed to complete his year of qualifying service for an annual holiday to the extent of 115 days (the period from June 16, 1949, to October 9, 1949).

The Inspector of Awards claimed to recover to the use of the worker the sum of £5 2s. 1d. It was common ground that the terms of the worker's contract of service included the following:

(a) Subject to agreement between the employer and worker, the taking of annual leave in advance of the date of completion of the qualifying year of service.

(b) The payment in advance of the worker's ordinary pay for the period of such annual holiday.

(c) A right on the part of the employer to make a deduction from the wages of the worker who has taken his annual holiday in advance in the event of termination of the contract of service before the date of completion of the qualifying year of service.

Clause 6 of the New Zealand Harbour Boards' Employees' Award, 1949, provided as follows:

"6. (a) Except where otherwise provided, workers shall, after the completion of each year of service, be entitled to two weeks' holiday on ordinary pay.

"In the case of shift-workers and workers who are required to work on Saturdays or Sundays at less than the penalty rates specified in cls. 4 (1) and 5 (c), three weeks' holiday on ordinary pay shall be allowed.

"(b) In the event of any of the holidays specified in cl. 5 (b) hereof occurring during the period of the annual holidays, such day or days shall be added to the annual holiday.

"(c) Should any worker be discharged or leave the service before his annual holidays are due, he shall be entitled to a holiday payment on a *pro rata* basis of the service rendered in that year.

"(d) The annual holidays shall, as far as practicable, be arranged to be taken between September 1 and May 31 in each year. Workers shall be given at least fourteen days' notice prior to the date of going on annual holiday."



The worker's ordinary pay for the two weeks during which he took his annual holiday amounted to £16 4s.; and the deduction of £5 2s. 1d. represented 115/365ths of that sum.

*Held*, 1. That the provision in the contract of service imposing upon the worker the obligation to make a refund in certain circumstances was not, for the purposes of s. 152 of the Industrial Conciliation and Arbitration Act, 1925, inconsistent with the award, for the reason that the award was silent on the question of taking annual holidays in advance and in regard to deductions from wages.

2. That, while s. 3 of the Annual Holidays Act, 1944, was the appropriate section for the purposes of s. 7 (1) in considering whether the worker was entitled under his contract of service (as deemed to be modified by the award) to a total benefit that was more favourable to the worker than the total benefit provided by the Annual Holidays Act, 1944, this case could be determined without deciding whether or not s. 3 applied.

*Australian Mutual Provident Society v. Evans* ([1948] G.L.R. 531), *Leonard v. Auckland Electric-power Board* ((1950) 7 N.Z.L.G.R. 219), and *Hanson v. Devonport Steam Ferry Co., Ltd.* ([1950] N.Z.L.R. 573) referred to.

3. That, if s. 3 of the Annual Holidays Act, 1944, did not apply, the contract of service operated, and a deduction from wages was allowable as a set-off against portion of a payment made in advance in respect of an annual holiday to which the worker had not become fully entitled; and s. 8 of the Wages Protection and Contractors' Liens Act, 1939, had no bearing on the issue.

4. That, upon the assumption that s. 3 of the Annual Holidays Act, 1944, applied to the worker, the employer, when agreeing to the taking of a holiday wholly in advance under the proviso to s. 3 (2), was justified in treating the completion of a year's service as an implied condition on which he was entitled to rely before concurring in the proposal.

5. That the steps taken by the Board to adjust the financial position between it and the worker were permissible, as there was nothing in the Annual Holidays Act, 1944, or in the award to prohibit such a course; and that the manner in which the adjustment was made was reasonable and equitable.

ACTION by the Inspector of Awards claiming to recover to the use of E. G. Wakefield the sum of £5 2s. 1d. from the Wellington Harbour Board. The facts were not in dispute.

For some appreciable time before June 16, 1949, Wakefield was employed by the defendant Board as a hydraulic crane driver. For the purposes of the Annual Holidays Act, 1944, his qualifying year of service was to end on October 9, 1949.

By agreement between the worker and the employer, pursuant either to the proviso to subs. 2 of s. 3 of the Annual Holidays Act, 1944, or to a condition of the contract of service, the worker took the whole of his two weeks' annual holiday in advance during the fortnight commencing March 21, 1949. The employer paid the worker two weeks' ordinary pay before the commencement of the holiday. The worker voluntarily terminated his employment on June 16, 1949.

From moneys due to the worker (a sum of £30 10s. 11d., which included arrears of back pay and payment for overtime as well as ordinary pay) at the end of the last complete pay period before June 16 (the period from May 30, 1949, to June 12, 1949), the employer deducted the sum of £5 2s. 1d. In making the deduction, the employer followed a practice which had been in vogue for a long period, extending back to a date well before the date of the passing of the Annual Holidays Act, 1944, the practice being well known to the worker and his fellow-workers.

G. F. Grieve, for the plaintiff.  
J. F. B. Stevenson, for the defendant.

*Cur. adv. vult.*

The judgment of the Court was delivered by

- 5 TYNDALL, J. The justification for the deduction is claimed to be the fact that the worker failed to complete his year of qualifying service for annual holiday to the extent of 115 days (the period from June 16, 1949, to October 9, 1949).

- The New Zealand Harbour Boards' Employees' Award, 1949 (*49 Book of Awards*, 833), made on May 2, 1949, provided for increases in pay retrospective in operation to December 3, 1948. The worker's ordinary pay for the two weeks during which he took his annual holiday amounted to £16 4s. The deduction of £5 2s. 1d. represents 115/365ths of £16 4s. The right of the employer to make this deduction is  
10 challenged by the Inspector of Awards.

The Court was informed that the action is in the nature of a test case, and is of some importance, for the reason that the practice which has been followed in the past by the Wellington Harbour Board is followed by a number of other large corporations.

- 20 The following matters require consideration :

(i) Certain terms and conditions of the contract of service between the worker and the employer which are relevant to the issue.

- (ii) The provisions of cl. 6 of the New Zealand Harbour Boards' Employees' Award, 1949.

- 25 (iii) The provisions of ss. 3, 4, and 7 (1) of the Annual Holidays Act, 1944.

(iv) The provisions of ss. 8 and 19 (4) of the Wages Protection and Contractors' Liens Act, 1939.

- 30 (v) The provisions of ss. 150 and 152 of the Industrial Conciliation and Arbitration Act, 1925.

It is common ground that the terms of the contract of service established by accepted practice between the Harbour Board and its employees over a number of years included the following :

- 35 (a) Subject to agreement between the employer and worker, the taking of annual leave in advance of the date of completion of the qualifying year of service.

(b) The payment in advance of the worker's ordinary pay for the period of such annual holidays.

- 40 (c) A right on the part of the employer to make a deduction from the wages of the worker who has taken his annual holiday in advance in the event of termination of the contract of service before the date of completion of the qualifying year of service.

Clause 6 of the award reads as follows :

(a) Except where otherwise provided, workers shall, after the completion of each year of service, be entitled to two weeks' holiday on ordinary pay.

- 45 In the case of shift-workers and workers who are required to work on Saturdays or Sundays at less than the penalty rates specified in cls. 4 (1) and 5 (c), three weeks' holiday on ordinary pay shall be allowed.

- 50 (b) In the event of any of the holidays specified in cl. 5 (b) hereof occurring during the period of the annual holidays, such day or days shall be added to the annual holiday.

(c) Should any worker be discharged or leave the service before his annual holidays are due, he shall be entitled to a holiday payment on a *pro rata* basis of the service rendered in that year.

- 55 (d) The annual holidays shall, as far as practicable, be arranged to be taken between September 1 and May 31 in each year. Workers shall be given at least fourteen days' notice prior to the date of going on annual holiday.

Sections 3, 4, and 7 (1) of the Annual Holidays Act, 1944, are as follow :

3. (1) Except as otherwise provided in this Act, every worker shall at the end of each year of his employment by any employer become entitled to an annual holiday of two weeks on ordinary pay.

(2) Where a worker employed by any employer becomes entitled to an annual holiday under this section, the employer shall allow the holiday to the worker within six months after he has become entitled to it :

Provided that if the worker and the employer so agree the holiday may be taken in two periods of one week each and the holiday or any such part thereof may be taken wholly or partly in advance, before the worker has become entitled to the holiday as aforesaid.

(2A) In the absence of any agreement by the worker to the contrary, the employer shall give to the worker not less than seven days' notice of the date on which the worker is to begin any annual holiday or any part thereof, and shall before that date pay to the worker his ordinary pay for the period of the holiday or part thereof, as the case may be.

(3) If the employment of the worker is terminated before any annual holiday to which he is entitled has been allowed to him, the employer shall be deemed to have allowed the holiday to the worker from the date of the termination of the employment and shall forthwith pay to the worker, in addition to all other amounts due to him, his ordinary pay for the period of that annual holiday.

(4) Where any special holiday for which the worker is entitled to payment under any Act, award, or agreement or under his contract of service (or, as the case may be, for which he would have been so entitled to payment if his employment had not been terminated) occurs during the period of any annual holiday allowed or deemed to have been allowed to any worker under this section, the period of the annual holiday shall be deemed to be increased by one day in respect of that special holiday.

4. (1) This section applies with respect to every period of employment of a worker by any employer which is less than one year, computed from the date of the commencement of the employment as determined under section eight of this Act or (where the worker has during the employment become entitled to any annual holiday or holidays under section three of this Act) computed from the date on which he became entitled to that annual holiday or to the last annual holiday, as the case may be :

Provided that this section shall not apply to any period of employment to which section five of this Act applies.

(2) Except as otherwise provided in this Act, where the employment of any worker by any employer is terminated at the end of a period of employment to which this section applies, the employer shall forthwith pay to the worker, in addition to all other amounts due to him, an amount equal to one twenty-fifth of his ordinary pay for that period of employment.

7. (1) The following provisions shall apply in every case where provision is made by or under any Act other than this Act or by any award, agreement, or contract of service for annual holidays or annual leave for any worker :—

(a) Where the worker is entitled under any such provision to any benefit that is more favourable to the worker than the benefits provided by section three or section four or section five of this Act, as the case may be, that section shall not apply to the worker :

(b) Where any such provision is not more favourable to the worker than section three or section four or section five of this Act, as the case may be, that section shall apply to the worker, and no benefit shall be allowed to the worker under that provision after the commencement of this Act, and any benefit allowed to the worker under that provision before the commencement of this Act but after the thirty-first day of December, nineteen hundred and forty-three, shall be deemed to have been allowed under section three or section four or section five of this Act, as the case may be, and the benefit to which the worker is entitled under that section shall be reduced accordingly.

Sections 8 and 19 (4) of the Wages Protection and Contractors' Liens Act, 1939, read as follows :

8. The entire amount of the wages earned by or payable to any worker shall be actually paid to him in money, and not otherwise, and every worker shall be entitled to recover from his employer in any Court of competent jurisdiction so much of the wages earned by the worker as has not been actually paid to him by his employer in money.

19. (4) Nothing in this Part of this Act shall be construed to prevent the making of, or to render invalid, any provision in any award or industrial agreement under the Industrial Conciliation and Arbitration Act, 1925.

- Sections 150 and 152 of the Industrial Conciliation and Arbitration Act, 1925, provide as follows :

150. No award of the Court shall contain any provision that is inconsistent with any statute which makes special provision for any of the matters before the Court.

152. Every award or industrial agreement shall prevail over any contract of service or apprenticeship in force on the coming into operation of the award or industrial agreement, so far as there is any inconsistency between the award or industrial agreement and the contract; and the contract shall thereafter be construed and have effect as if the same had been modified, so far as necessary, in order to conform to the award or industrial agreement.

- 20 Mr. *Grieve*, for the plaintiff, submitted that s. 3 of the Annual Holidays Act, 1944, is not less favourable to the worker concerned than the award or the contract of service, and, consequently, by virtue of s. 7 (1), the conditions appertaining to the annual holiday of the worker are determined by s. 3 of the statute, and not by either the award or the contract of service.

He contended that the employer and worker agreed to the annual holiday's being taken wholly in advance in accordance with the proviso to s. 3 (2) of the Act, and that the worker was paid his ordinary pay for two weeks, as directed by s. 3 (2A).

- 30 The worker thus having been paid in full for the annual holiday period, the employer had no right to attempt later to bring the worker within the provisions of s. 4, dealing with proportionate payment. Mr. *Grieve* claimed that, if an employer agrees with a worker that the annual holiday is to be taken wholly in advance, the employer (in the absence of any agreement by the worker to the contrary) has to pay the worker ordinary pay for the period of the holiday, and that is the end of it.

- He submitted finally that the Act did not contemplate that a worker should receive less than a week's wages for each week from the beginning of his employment to the termination of his employment, and that there was no authority under either the Act or the award entitling the employer to make a deduction from the wages earned by the worker in the last complete pay period before the termination of the employment.

- It was contended by Mr. *Stevenson*, on behalf of the employer, that the deduction of £5 2s. 1d. from the wages of the worker was made under the authority of the special condition of the contract of service quoted above (para. (c)), and, in any case, was in accordance with natural justice and equity. It was also contended that, when the worker took his annual holiday in advance and accepted his pay for the period of such holiday, there was established on his part a tacit undertaking to continue his employment until the year of qualifying service was completed, and that, if and when the undertaking was not kept, the employer was entitled under common law to make a deduction from wages proportionate to the deficiency in the period of qualifying service.

- Mr. *Stevenson* submitted further that the interpretation advocated by the plaintiff led to anomalies, absurdities, and injustice.

The construction to be placed upon s. 7 (1) of the Annual Holidays Act, 1944, has been discussed in *Australian Mutual Provident Society*

v. *Evans* ([1948] G.L.R. 531), in *Leonard v. Auckland Electric-power Board* ((1950) 7 N.Z.L.G.R. 219), and in *Hanson v. Devonport Steam Ferry Co., Ltd.* ([1950] N.Z.L.R. 573).

In *Evans's* case ([1948] G.L.R. 531), *Cornish, J.*, commented as follows: "There may, of course, be cases in which the provision in the "Annual Holidays Act, 1944, for a fortnight's holiday with pay is not "applicable, for the reason that provision is otherwise made (as by "contract or award) for an annual holiday for the agent, and the latter "is entitled under such provision 'to any benefit that is more favourable " 'to the worker than the benefits provided' by the relevant sections 10  
"of the Act. Mr. *Watson* contends that the present case is an instance "of such exclusion of the Act. He laid stress on the expression 'any " 'benefit'; and contended that if there was to be found in the holiday "context of the contract or award any individual element of advantage "that was more favourable to the worker than the *benefits* (note the 15  
"plural) conferred by the Act, the Act did not apply. There may be— "and I think are—in the award under consideration particular "ingredients of superior advantage to the worker, but I think that they "can have the effect of ousting the Act only if they exceed in value "the totality of the benefits conferred by the Act" (*ibid.*, 531). 20

In *Leonard's* case ((1950) 7 N.Z.L.G.R. 219), *Smith, J.*, said: "The "words 'the benefits provided by section three or section four or section " 'five' must be read to mean, I think, 'the benefit provided by section " 'three or the benefit provided by section four or the benefit provided 25  
" 'by section five.' Comparison is to be made between the total benefit "provided under the contract of service, or the award, and the total "benefit provided by s. 3 or by s. 4 or by s. 5, as the case may be" (*ibid.*, 248).

With respect, we agree with these conclusions. Great difficulty, however, is encountered when it comes to applying the section. 30

In the present case, we have a contract of service with special conditions relating to the taking of annual holidays in advance, including (in effect) an obligation upon the worker to make a refund to the employer in certain circumstances. Then we have an award in which there is no direct reference to the taking of annual holidays in advance, although the effective operation of cl. 6 (d) of the award no doubt in practice can be expected, in a certain proportion of cases, to involve such action. 35

So far as there is any inconsistency between the award and the contract of service, the latter, under s. 152 of the Industrial Conciliation and Arbitration Act, 1925, must be construed as if it had been modified, so far as necessary, in order to conform to the award. The question arises whether the provision in the contract of service imposing upon the worker the obligation to make a refund in certain circumstances is inconsistent with the award. We do not think it is, for the reasons 45  
that the award is silent on the question of annual holidays in advance and that it is also silent in regard to deductions from wages.

We are now called upon to consider whether the worker is entitled under his contract of service (as deemed to be modified by the award) to a total benefit that is more favourable to the worker than the total benefit provided by the appropriate section of the Annual Holidays Act, 1944. We are of the opinion that, for the purposes of the present case, the appropriate section of the Act is s. 3, and that ss. 4 and 5 can be ignored. 50

We find it very difficult to arrive at a satisfying conclusion as to which set of conditions is more favourable to the worker. Clause 6 (d) of the award, for example, contains ingredients of a more favourable character to the worker than the Act—namely, the direction that annual holidays shall, as far as practicable, be arranged to be taken in the non-winter months, and the unconditional prescription of a minimum of fourteen days' notice to the worker as compared with a conditional minimum of seven days under subs. 2A.

It does seem to us, however, that this case can be determined without deciding whether or not s. 3 of the Act applies. If s. 3 does not apply, then the contract of service operates, and a deduction from wages is allowable as a set-off against portion of a payment made in advance in respect of an annual holiday to which the worker has never become fully entitled. We do not think that s. 8 of the Wages Protection and Contractors' Liens Act, 1939, has any bearing on the issue, as we are merely in the process of determining what amount of wages is payable to the worker. At this stage, it should be observed that s. 6 of the Annual Holidays Act, 1944, declares that all moneys payable by an employer to any worker under the Act shall be deemed to be salary or wages earned by the worker.

We now proceed to examine the position upon the assumption that s. 3 of the Annual Holidays Act, 1944, applies to the worker. It appears to us that s. 3 contemplates continuity of employment with the one employer throughout the full year of qualifying service, and that the employer, when agreeing to the taking of a holiday wholly in advance under the proviso to s. 3 (2), is justified in treating the completion of the year's service as an implied condition upon which he is entitled to rely before concurring in the proposal. Otherwise, the proviso is in the nature of a trap for the employer, and we hesitate to think that the Legislature intended such to be the case. We consider that, if there were no such implied condition, agreements would seldom (if ever) be entered into, and the objects of the section would not be fully achieved. We do not think that such a state of affairs would be in the best interests of workers or employers in general, or in the best interests of the public. It is also difficult to conceive that the Legislature intended that the door should be left wide open to allow a worker, without any consequential financial adjustment, to take his annual holiday on pay in advance, then to resign, and to take up employment with another employer, thereby commencing a further year of qualifying service several months before the nominal end of the original qualifying year. If such were the position, there would obviously be many opportunities for abuse, particularly under to-day's rapid turn over of labour in industry as disclosed by the official statistics of the Department of Labour and Employment.

Having decided that there is a tacit undertaking on the part of the worker to complete his year of qualifying service, we have to consider whether the steps taken by the defendant Board to adjust the financial position between it and the worker were permissible under the law. We can discern nothing in the Annual Holidays Act, 1944, or in the award to prohibit such a course. The manner in which the adjustment was made is, in our opinion, reasonable and equitable.

The conclusions we have reached in this case appear to be more compatible with the principles underlying the legislation than are the contentions of the plaintiff in the following respects :

(i) The financial responsibilities under the Annual Holidays Act, 1944, are shared equitably between the two or more employers who may be involved.

(ii) The possibility of dual or triple payments of holiday pay to a worker in respect of the same period of qualifying service is avoided.

(iii) The anomaly of rewarding broken service with several employers more generously than continuous service with one employer and the disturbing effects which would arise amongst workers from such differential treatment are avoided.

Judgment is entered for the defendant.

*Judgment for the defendant.*

Solicitor for the plaintiff: *Labour Department Solicitor* (Wellington).

Solicitors for the defendant: *Izard, Weston, Stevenson, and Co.* (Wellington).

[IN THE SUPREME COURT.]

### CALDER v. WELLINGTON CITY CORPORATION.

SUPREME COURT. In Chambers. Wellington. 1950. August 4; November 6. HUTCHISON, J.

*Municipal Corporations—Delay in commencing Action for Personal Injuries—Notice of Intended Action out of Time—Action not commenced within Six Months—Circumstances justifying Waiver of Lateness of Notice—Onus on Plaintiff to prove “reasonable excuse” for Delay in commencing Action—Onus not discharged—“Reasonable excuse”—Municipal Corporations Act, 1933, s. 361 (1) (2) (8)—Municipal Corporations Amendment Act, 1938, s. 35 (1) \*.*

On May 13, 1949, the plaintiff sustained personal injuries through a fall caused by a trailer alleged to belong to the defendant Corporation, against whom she claimed damages on the grounds of nuisance and negligence.

The plaintiff was an in-patient at the Wellington Hospital for four days, and, on her discharge, she was under the care of a private nurse for eight weeks at her home, and received massage treatment. She was unable to attend to her normal duties for many months after the accident; but the evidence did not show that her incapacity to attend to business matters extended beyond a date in September or early in October, 1949.

Shortly before October 13, the plaintiff called at the City Engineer's Department of the defendant Corporation, and was informed that her accident would be investigated. On October 13, the plaintiff's daughter wrote to the Town Clerk, on behalf of her mother, a letter which was received at the Town Clerk's office on October 17, claiming compensation for the injuries sustained by her. The Town Clerk replied on October 18, stating that the Council did not accept liability, but that inquiries would be made into the circumstances of the matter. There was no further communication between the plaintiff and the defendant Corporation.

In April, 1950, the plaintiff consulted her solicitor, when she was informed for the first time that she should have commenced proceedings within six months of the date of her accident. The solicitor wrote to the plaintiff's medical adviser for a report, which he received on May 25. He then made inquiries of witnesses to the accident. On July 13, 1950, a writ was issued against the defendant Corporation claiming damages.

On a motion for an order waiving non-compliance by the plaintiff with the provisions of s. 361 (1) and (2) of the Municipal Corporations Act, 1933, *Held*, That, while the requirement of subs. 1 of s. 361 of the Municipal Corporations Act, 1933, might be waived, as the notice was only slightly defective, and was out of time only about four days, to enable it to run a full month before the time arrived for the issue of a writ, the plaintiff had not discharged the onus resting on her of establishing a reasonable excuse, as

\* See (after January 1, 1952) s. 23 of the Limitation Act, 1950.

required by subs. 8, for the delay in not commencing the action within the last three weeks of the six-months period, and for the further delay that occurred after the expiration of that period.

*Wellington City Corporation v. Laming* ([1933] N.Z.L.R. 1435), *Young v. Mayor, &c., of Christchurch* (1907) 27 N.Z.L.R. 729, and *Cerchi v. Mayor, &c., of Wellington* (1913) 15 G.L.R. 626 applied.

*Simpson v. Geary* ([1921] N.Z.L.R. 285), *Mahoney v. Thomas Borthwick and Sons (Australasia), Ltd.* ([1944] N.Z.L.R. 80), *Corrie v. Pitblie and Ritchie* ([1920] G.L.R. 252), and *Boyd v. Sturm* ([1943] G.L.R. 305) distinguished.

MOTION for an order waiving non-compliance by the plaintiff with the provisions of subs. 1 and 2 of s. 361 of the Municipal Corporations Act, 1933, in connection with an action brought by her against the defendant Corporation upon the grounds that the action involved a claim for damages for injury to the person and that the plaintiff had reasonable excuse for not complying with these provisions.

The plaintiff, on July 13, 1950, issued her writ, the statement of claim alleging that, on May 13, 1949, in Sydney Street East, in the City of Wellington, she had tripped over a draw-bar of a stationary caravan owned by the defendant Corporation, and thereby sustained personal injuries in respect of which she claimed damages. She alleged the existence of a public nuisance created by the defendant Corporation in allowing the draw-bar of the caravan to obstruct the highway, and negligence on the part of the Corporation in failing to light an obstruction in the highway and a dangerous place and in failing to deal with the draw-bar in such a way as not to obstruct her passage. She pleaded that notice of her cause of action was duly delivered to the defendant Corporation on October 13, 1949. The Corporation pleaded a general denial and contributory negligence. It admitted receiving a letter dated October 13, 1949, from the plaintiff's daughter on behalf of the plaintiff, but denied that the letter was a sufficient notice within the provisions of s. 361 of the Municipal Corporations Act, 1933. It pleaded as a further defence:

9. That no notice of action as required by the Municipal Corporations Act, 1933, was given to the defendant prior to the commencement of this action.

10. That this action was not commenced within six months after the date or thing complained of was done or omitted.

11. That the defendant invokes the provisions of s. 361 of the Municipal Corporations Act, 1933, as a bar to this action.

30 The facts sufficiently appear from the judgment.

*Rose*, for the plaintiff, in support. The plaintiff in her letter to the Town Clerk complied with s. 361 (1), as she specified the cause of action and her name and residence. She had no solicitor at that stage, because then she had no intention of bringing proceedings. The Court takes a liberal view of its powers under this section or corresponding sections. If there is a genuine claim, the Court will be reluctant to defeat it on a technicality, with the exception that the defence must not be prejudiced by delay. The Court's liberal view is shown in *Young v. Mayor, &c., of Christchurch* (1907) 27 N.Z.L.R. 729, 731. All the circumstances are to be considered: *Cerchi v. Mayor, &c., of Wellington* (1913) 15 G.L.R. 626. So far as the time limitation is concerned, an even more liberal interpretation should be given if, as here, the defendant Corporation knew of the plaintiff's complaint. If it knows and has investigated, there is no need for a time limitation: see the cases under the Workers'



Compensation Act, 1922: *Mahoney v. Thomas Borthwick and Sons (Australasia), Ltd.* ([1944] N.Z.L.R. 80), *Corry v. Pithe and Ritchie* ([1920] G.L.R. 252), and *Boyd v. Sturm* ([1943] G.L.R. 305). In this case, the Corporation knew of the claim within five months of the injury giving rise to the action.

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*F. H. Jones*, for the defendant Corporation, to oppose. An order waiving non-compliance with the statutory prerequisite to an action should not be made, because (a) the plaintiff's letter was not sufficient notice under s. 361, and (b) the time of commencing the action exceeded the six-months' limitation. The onus is on the plaintiff to show a reasonable excuse *Macdonald's Workers' Compensation*, 2nd Ed. 486, para. 965.

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An analysis of the cases cited for the plaintiff shows some real reason for the delay, such as the fact that a Union official had bungled: *Boyd v. Sturm* ([1943] G.L.R. 305) and *Mahoney v. Thomas Borthwick and Sons (Australasia), Ltd.* ([1944] N.Z.L.R. 80); or the plaintiff did not know that the accident would cause incapacity, or the liability was never in dispute, or the facts were known to all parties immediately after the accident; but there is no case which goes so far as the facts in this case. There is no explanation for the plaintiff's delay: even after she consulted a solicitor in April, there was a further long delay until the issue of the writ on July 13. The standard by which to judge delay caused by illness appears from *Wellington City Corporation v. Laming* ([1933] N.Z.L.R. 1435), in which the Court of Appeal set the standard as being such a state of mental or bodily illness that the plaintiff is unable to attend to business. The authorities do not show that the Courts condone delay: the contrary is shown in *Richards v. Martha Gold Mining Co. (Waihi), Ltd.* ([1945] G.L.R. 13), *Welsh v. Ocean Beach Freezing Co., Ltd.* ([1944] N.Z.L.R. 92), and *Aitken v. Palmerston North Golf Club (Inc.)* ([1941] G.L.R. 23). No reasonable excuse has been established here, and, if s. 361 is to mean anything, the plaintiff must fail.

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*Rose*, in reply.

*Cur. adv. vult.*

HUTCHINSON, J. The evidence on the present motion is that on May 13, 1949, the plaintiff sustained injuries in the circumstances set out in her statement of claim; that she was an in-patient at Wellington Hospital for four days; and that on her discharge she was under the care of a private nurse for eight weeks at her house and received massage treatment. Her daughter says that the plaintiff was completely unable to attend to her normal duties for many months after the accident. I do not take this as intended to set up any incapacity to attend to business matters beyond a date which is not precisely fixed but is thought by the plaintiff and her daughter to have been some time in September, 1949, though it may possibly have been early in October, on which the plaintiff and her daughter called at the City Engineer's Department of the defendant Corporation. On that call they saw a Mr. Thomas, who is a member of the staff of that Department, his position being Divisional Engineer. He is unable to say what the date of that call was, but places it as shortly before the receipt by the Town Clerk of the letter of October 13 to which I shall refer later. The plaintiff and her daughter say that, when they interviewed Mr. Thomas, he informed them that the accident would be investigated and that he thought that the van had been hired to a private contractor, but that a City Council doctor would

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examine the plaintiff; and they say that further remarks made by Mr. Thomas led them to believe that the case would be settled. Mr. Thomas says that the plaintiff complained that she had suffered injury through a fall caused by a "trailer" situated near Molesworth Street, that he could not identify the "trailer" as one belonging to the City Council, and that he thought that it might have belonged to a private contractor. He cannot remember whether he informed the plaintiff that the accident would be investigated, but says that it is probable that he would have done so. He denies that he led the plaintiff to believe that the case would be settled; he had no power or authority to make such a statement, and it is not his practice to admit liability or make any arrangements regarding the settlement of claims, which is done only after the fullest investigation and on the advice and with the concurrence of the City Solicitor. He says that it is not the practice of the City Council to arrange for either a representative of the Council or the Council doctor to call upon people who make complaints, and, to the best of his knowledge and belief, he would not have led the plaintiff to believe that any such person would call upon her; he receives many complaints and allegations from people, and his normal procedure is to advise claimants that their case should be stated in writing; to the best of his knowledge and belief, he would have given the plaintiff similar advice.

It seems to be reasonably clear that Mr. Thomas told the plaintiff and her daughter that he thought that the "trailer" (or whatever other description was given to the vehicle) might have belonged to a private contractor, and that he told them that the claim would be investigated. I doubt very much whether he told them that a doctor or representative of the City Council would call upon them, though they might well have received that impression, and I do not accept the view that he led them to believe that the case would be settled. This would be a most unlikely thing for an officer of the Corporation to do, and I would say that it cannot be put any higher than that this was an inference that the plaintiff and her daughter formed from a courteous reception of their complaint by Mr. Thomas.

On October 13, 1949, the plaintiff's daughter wrote a letter to the Town Clerk, received at the Town Clerk's office on October 17, as follows:

I am writing on behalf of my mother to make a claim for compensation for serious injuries sustained by her in an accident which occurred on the night of Friday, May 13, 1949, at approximately 6 p.m. in Sydney Street East, near the corner of Molesworth Street, due to one of your Council's waggons being left in an unlighted condition, with the coupling-iron down on to the roadway, no lights, white barrels, or indications of danger being present. Mother caught her feet in the coupling as she was crossing to the pavement and was thrown very heavily to the edge of the kerbing, injuring her left side of forehead and eyebrow, a broken left shoulder and very badly injured elbow and left hand, also right elbow broken and numerous bruises on her legs and body, and of course very badly shocked.

Mother has been in very indifferent health since. We have had a trained nurse in the house for eight weeks.

The reason why we have not made a claim earlier is because we did hope Mother's arm would show improvement, but the injuries are now of a permanent nature.

The plaintiff and her daughter say that, before writing this letter, they had been expecting a visit from a doctor or a representative of the City Council, and that, as no such visit had been received by October 13, the letter was written. The defendant's suggestion is that the letter was probably written quite shortly after the visit to Mr. Thomas, and in accordance with advice from him that the complaint should be put in writing. This letter was replied to on October 18, by the Town Clerk:

I have to acknowledge your letter dated 13th instant, forwarding claim for compensation on behalf of your mother with regard to an accident in Sydney Street on May 13 last, and desire at this stage to state that the Council does not accept liability. Inquiries will, however, be made into the circumstances of the matter.

After the receipt by the plaintiff and her daughter of the Town Clerk's letter of October 18, there was no further communication between the plaintiff and the defendant. In April, 1950, the plaintiff consulted her solicitor, when she was then informed for the first time that she should have commenced proceedings within six months of the date of her accident. The solicitor wrote to the plaintiff's medical adviser on April 21, 1950, for a medical report, which he received on May 25. He then made inquiries of witnesses to the accident, and on July 13 issued the writ.

Section 361 of the Municipal Corporations Act, 1933, as amended by s. 35 (1) of the Municipal Corporations Amendment Act, 1938, provides as follows :

(1) No action or proceeding shall lie against the Corporation or Council, or any member or officer of the Council or of any committee appointed by the Council, or other person acting under the authority or in the execution or intended execution or in pursuance of this Act or any other Act, for any alleged irregularity, or trespass, or nuisance, or negligence, or any act or omission whatever, unless notice in writing specifying the cause of the action or proceeding, and the name and residence of the intending plaintiff or prosecutor, and of his solicitor or agent in the matter, is given by the intending plaintiff or prosecutor to the intended defendant one month at least before the commencement of the action or proceeding.

(2) Every such action or proceeding shall be commenced within six months next after the act or thing complained of is done or omitted or, in case of a continuation of damage, within three months next after the doing of such damage has ceased, and not afterwards . . . .

(3) In cases of injury to the person (whether resulting in death or not) the Court may, before or at the trial, waive the non-compliance or insufficient compliance with subsections one and two hereof, if satisfied that there was reasonable excuse, and on such terms as the Court thinks fit.

These subsections were considered by the Court of Appeal in *Wellington City Corporation v. Laming* ([1933] N.Z.L.R. 1435), where the Court held that the cases under ss. 26 and 27 of the Workers' Compensation Act, 1922, in so far as they were decided on the words "reasonable cause," were an authoritative guide in the interpretation of these provisions. In that case, the only reason argued for the absence of notice and the delay in taking proceedings was that the plaintiff was incapacitated from attending to business through being confined to bed in hospital for over six months following the accident out of which the claim arose. The Court held, on the facts, that, though so confined to bed, he was not too ill to attend to business, and it allowed an appeal against the order made in the Supreme Court waiving non-compliance with the section. That case, it seems to me, was a considerably stronger case, from the plaintiff's point of view, on the question of incapacity to attend to business, than is the present one. Here, the plaintiff was in person able to attend at the office of the defendant Corporation by the end of September or early October and lodge her complaint, and, at that time, there was still over a month available before the expiration of the six months referred to in subs. 2.

In this case, however, it is argued that the impression received by the plaintiff from Mr. Thomas, and her waiting for a call from a doctor or other representative of the City Council, afforded reasonable excuse for her non-compliance with the requirements of the section, and reference was made to *Young v. Mayor, &c., of Christchurch* (1907) 27 N.Z.L.R. 729), *Cerchi v. Mayor, &c., of Wellington* ((1913) 15 G.L.R. 626), and a number of cases under the Workers' Compensation Act, 1922. Upon

the authority of the first-named cases, I would, I think, be justified in making an order waiving non-compliance with the requirements of subs. 1 relating to notice. The notice here sufficiently specified, I think, the plaintiff's cause of action, and it gave her name and residence. It was defective in not giving the name and residence of her solicitor, and, possibly, in not stating in so many words that an action was to be brought. At that time, she had no solicitor instructed to act in the matter, but her own name was given, and her address, to which any communication might be made; what she described as a "claim for compensation" was put forward; and material was given in her letter on which the Corporation might initiate inquiries. The notice was out of time only about four days to enable it to run a full month before the time arrived for the issue of a writ.

However, the plaintiff then received the Town Clerk's letter of October 18, which was a denial of liability. The letter certainly said that inquiries would be made into the circumstances, but I do not think that on that account I would be justified in waiving compliance with the peremptory provision of subs. 2 requiring proceedings to be commenced within six months of the act complained of. The onus of establishing "reasonable excuse" under subs. 8 rests upon the plaintiff, and, before the Court may waive non-compliance, it must be satisfied that there was reasonable excuse. Here, over three weeks remained of the six months when the Town Clerk's letter was received, and nothing was done by the plaintiff until she consulted her solicitor five months after the expiration of the six months. No real reason is put forward for this. The reason, no doubt, is that she did not know of the statutory provision, a reason that does not help her. Then, three more months expired while her solicitor was inquiring into the matter before the writ was issued. Assuming that that time was reasonably required for the purpose, there is, in my view, no reasonable excuse proved for the delay from October 19 to the date in April on which the solicitor was instructed. There is, over that period, no history of an apparent acceptance of liability, as in *Simpson v. Geary* ([1921] N.Z.L.R. 285), of reliance upon a long-established course of practice, as in *Mahoney v. Thomas Borthwick and Sons (Australasia), Ltd.* ([1944] N.Z.L.R. 80), or of inaction or muddle on the part of a person on whom the plaintiff relied, as in *Corrie v. Pithe and Ritchie* ([1920] G.L.R. 252) and in *Boyd v. Sturm* ([1943] G.L.R. 305); and by October 19 the results of the accident had manifested themselves for some time.

In my consideration of this case, I have given some weight, at any rate, to the delay that occurred after the period of six months expired. It was left open by the Court of Appeal in *Wellington City Corporation v. Laming* ([1933] N.Z.L.R. 1435) whether delay after the six months is a relevant or material consideration if reasonable excuse can be made out for not commencing the action within the six months. Here, I think that reasonable excuse is not made out for not commencing the action within the last three weeks of the six months. The effect of the further delay after the expiration of the period is to confirm that view.

While I would waive the requirement of subs. 1 as to notice, I find myself for this reason unable to waive the requirement of subs. 2 as to the time for commencement of proceedings. As the motion necessarily asks for an order waiving the requirements of both subsections, and as subs. 2 would appear to be fatal to the plaintiff's claim unless non-

compliance with it is waived, the proper course seems to me to dismiss the motion, which I do, but, in the circumstances, without costs.

*Motion dismissed.*

Solicitors for the plaintiff: *Macalister, Mazengarb, Parkin, and Rose* (Wellington).

Solicitor for the defendant Corporation: *City Solicitor* (Wellington).

## C. A. WILKINSON, LIMITED *v.* STRATFORD BOROUGH AND ANOTHER.

SUPREME COURT. New Plymouth. 1951. March 9, 21. FELL, J.

*Municipal Corporations—Roads and Streets—Reduction of Street Width—Onus on Council to prove Compliance with Statutory Requirements—Prescribed Procedure not carried out—No Jurisdiction for Magistrate to hear Objections—Municipal Corporations Act, 1933, s. 175 (4), Fifth Schedule, cls. 5, 6, 7.*

The Stratford Borough Council on March 20, 1950, passed a resolution to take the necessary steps to diminish the width of part of P. Street.

The Council called the meeting of the electors required by cls. 5 and 6 of the Fifth Schedule to the Municipal Corporations Act, 1933, and the meeting voted in favour of the Council's resolution. Eighty electors were present. There was a conflict of evidence as to whether a majority of the electors present voted for the Council's resolution, and there was no proof of a count of those who voted for it.

As required by cl. 7 of the Schedule, the Council sent to the Magistrate the plans of the proposed alterations to the street and the electors' decision thereon. The Magistrate sat to consider objections, when a preliminary objection was taken on behalf of the plaintiff to the effect that the procedure set out in the Fifth Schedule had not been complied with. The learned Magistrate refused to go into this question, but adjourned his inquiry to enable the plaintiff to raise the matter in the Supreme Court.

On a motion for certiorari and prohibition to prevent the Council and the Magistrate from proceeding further with steps to diminish the width of the street.

*Held*, 1. That, taking the number present at the meeting as being eighty, it was necessary, in order to comply with the requirements of cl. 6 of the Fifth Schedule to the Municipal Corporations Act, 1933, that forty-one electors should vote for the resolution to carry it; it was not sufficient for thirty-two to vote for the resolution and twelve against it, and for thirty-six not to vote, because the thirty-six electors who did not vote must, for the purposes of cl. 6, be taken to have voted against the resolution.

*Labouchere v. Earl of Wharfedale* ((1879) 13 Ch.D. 346) followed.

2. That, when the steps taken by the Council were challenged, the onus was on the Council to prove that the requirements set out in the Fifth Schedule to the statute had been complied with, but this had not been done; and, consequently, there was no authority to send the matter to the Magistrate, and there was no foundation for the Magistrate's jurisdiction to consider the matter, as there was no decision of the electors for him to confirm or reverse.

3. That the proceedings could not be dismissed for want of notice under s. 361 (1) of the Municipal Corporations Act, 1933, since, if notice had been required, individual rights or statutory provisions might have been defeated.

*Broad v. Tauranga County* ([1928] N.Z.L.R. 702) and *Grigg v. Auckland Electric-power Board* ([1925] N.Z.L.R. 184) applied.

*In re Symons v. Mayor, &c., of Foxton* (1905) 25 N.Z.L.R. 59) and *Oliver Road Board v. Guy* ((1890) 9 N.Z.L.R. 521) distinguished.

MOTION founded on a statement of claim for certiorari and prohibition to prevent the Borough Council and the Magistrate from proceeding further with steps to diminish the width of Portia Street in the Borough of Stratford, opposite lands owned by the plaintiff.

5 The facts sufficiently appear from the judgment.

*Sheat*, for the plaintiff.

*Grey*, for the defendant.

*Cur. adv. vult.*

FELL, J. The Stratford Borough Council on March 20, 1950, passed  
10 a resolution to take the necessary steps to diminish the width of part of Portia Street. The authority for doing this is contained in s. 175 of the Municipal Corporations Act, 1933, and the Fifth Schedule to this Act sets out the steps to be taken. *Mayor, &c., of Miramar v. McLeod and Attorney-General* ((1911) 31 N.Z.L.R. 54) decides that, so far as the  
15 Schedule is concerned, it applies to diminishing the width of a street as well as to stopping a street. The plaintiff makes no complaint about the steps taken until the stage is reached where the resolution required by cls. 6 and 7 of the Fifth Schedule was put to the meeting of electors and declared carried, when it says that less than a majority of the electors  
20 present at the meeting voted in favour of the resolution. In due course the Magistrate sat to consider objections, when Mr. Thomson, solicitor for the plaintiff, attended and took a preliminary objection that the procedure set out in the Fifth Schedule had not been complied with. The learned Magistrate (who was also joined as a defendant) refused to  
25 go into this question, but adjourned his inquiry to enable the plaintiff to raise the matter in this Court, which it does on a motion for prohibition.

Lengthy affidavits have been filed by both sides, and there is a considerable conflict as to the number of electors present at the meeting and the number that actually voted. As cl. 6 of the Fifth Schedule provides that "Such meeting shall decide by a majority of the district  
30 "electors present" whether or not the street is to be diminished, it is necessary for me to decide if the resolution was carried as provided by the Schedule, and, if it was not, what the consequences are.

The affidavits filed on behalf of the plaintiff put the numbers much  
35 higher than those given in the affidavits filed on behalf of the defendant. None of the plaintiff's witnesses actually counted the electors present. The Town Clerk counted them several times; the numbers varied slightly during the evening, and there were some persons present who were not electors. From the Town Clerk's evidence, I hold that, when  
40 the resolution was put, there were eighty electors present. (For reasons that will appear later, in my opinion, it is immaterial, having regard to what happened, whether there were seventy-seven or eighty-four electors present.)

If one takes the number present at eighty to comply with the requirements of cl. 6 of the Schedule, it was necessary that forty-one electors  
45 should vote for the resolution to carry it. It was not sufficient for, say, thirty-two to vote for the resolution, twelve to vote against it, and thirty-six not to vote. If that happened, the thirty-six electors who did not vote must, for the purposes of cl. 6, be taken to have voted against the  
50 resolution. That must follow from the wording of the section. But, if authority is wanted for this, the statement of *Sir George Jessel, M.R.*, in *Labouchere v. Earl of Wharncliffe* ((1879) 13 Ch.D. 346) seems conclusive, when he lays it down: "When a resolution is put to a meeting, the

"persons present may take one of three courses. They may vote for  
 "or against it, or, not wishing to express a positive opinion on the question,  
 "refrain from voting at all. This being so, those who do not vote may,  
 "by not doing so, turn the scale in favour of the accused member of the  
 "club. It was, therefore, the duty of the secretary, or scrutineer, to  
 "ascertain, first, how many persons were present when the question was  
 "put, and, secondly, how many of those present had voted for the  
 "resolution; but no such course has been adopted in this instance. It  
 "appears to me, then, that this also is a fatal objection" (*ibid.*, 354).  
 (The last sentence I have quoted because it has a bearing on the effect of  
 the non-carrying of the resolution which I shall refer to later.)

What happened at the meeting was that the Mayor from the chair  
 moved a resolution that the meeting, being of the opinion that the proposed  
 stopping was in the interest of the progress and welfare of the Borough,  
 resolved that 33 ft. (which the resolution defined) should be stopped.  
 Mr. *Thomson*, who was an elector as well as solicitor for the plaintiff,  
 moved an amendment. After discussion, the amendment was put to  
 the meeting, and, on the voices, was declared lost. Mr. *Thomson*  
 demanded a poll by way of a show of hands, and the Mayor took a division  
 by way of a show of hands and declared the voting to be twelve votes  
 for the amendment and thirty-two votes against the amendment. It  
 appears that more than thirty-two actually voted against the amendment.  
 After some further discussion, which has no bearing on the matter, the  
 original resolution was put. This is what the Mayor in his affidavit  
 says took place:

I put the resolution to the meeting by asking those in favour of the resolution  
 to say "Aye" and by asking those against the resolution to say "No." When  
 I called for the vote on the resolution, the volume of "Ayes" was loud and  
 decisive, and indicated to me as Chairman that practically all electors present had  
 voted in favour of the resolution. The expression of "No" was barely audible  
 to me, and the vote was very little short of being unanimous. Before declaring  
 the resolution carried, I offered to take a division by asking whether any elector  
 present desired a show of hands on the resolution, but no elector accepted the offer  
 . . . I therefore declared the resolution carried.

So far, there is no dispute as to what took place; but, when evidence  
 is sought to prove, not that a majority of those who voted, voted for the  
 resolution, but that a majority of electors present voted for the resolution,  
 there is nothing certain, only a contradiction based on the opinion of the  
 various deponents. The Mayor says flatly that the resolution was  
 carried by a majority of the district electors present. Mr. *Elgar* has no  
 doubt that it was carried by an emphatic majority of those persons.  
 Mr. *Robinson* says the resolution was clearly carried by a majority of  
 those persons present at the meeting. Mr. *Burgess* says he is completely  
 satisfied that the resolution was carried by a majority of those persons in  
 attendance at the meeting. Mr. *Scott* says he has no doubt that more  
 than one-half of the persons present at the meeting voted in favour of the  
 resolution, and he adds:

The volume of sound made by those saying "Aye" was considerable, and the  
 resolution was carried decisively.

For the plaintiff, Mr. *Thomson* says that, in his estimation, not more  
 than one-third of the electors present took part in voting either for or  
 against the motion. Mr. *Sinclair* says that not more than one-third of the  
 electors present took part in the voting. Mr. *Lawrence* and Mr. *H. D.*  
*Thomson* state that a large proportion of the district electors present did  
 not vote, and that the resolution was definitely not carried by a majority  
 of the district electors present.

In my view, when the steps taken by the Council are challenged, the onus is on the Council to prove that the requirements set out in the Schedule have been complied with. This has not been done. I am not prepared to say that the expressions of opinion in the affidavits filed on

behalf of the Borough Council prove that the majority of the electors present actually voted in favour of the resolution, and, in my opinion, this could be proved only by (i) a count of the electors present, and (ii) a count of those who voted for the resolution, either on a show of hands or by some other effective method. I accept the Town Clerk's evidence as to the number of electors present, but unfortunately there is no proof as to the count of those who voted for the resolution.

I hold, therefore, that there was no authority to send the matter to the Magistrate, that there is no foundation for the Magistrate's jurisdiction to consider the matter, and that there is no decision of the electors for him to confirm or reverse.

Apart from his argument on the facts, Mr. Grey, for the defendant, submits that, whether or not the resolution was carried by a majority of the electors present, it is the duty of the Magistrate to hear and determine the matter, and he refers me to *In re Symons v. Mayor, &c., of Foxton* ((1905) 25 N.Z.L.R. 59). I agree that this is authority for holding that the Magistrate cannot inquire into the steps taken by the Council to bring the matter before him, but it is not an authority on which there can be based an argument that this Court cannot inquire into the validity of the steps necessary to give the Magistrate jurisdiction. Mr. Grey also submitted that for the Supreme Court to inquire into the validity of the steps leading up to the sending of the matter to the Magistrate would make the Magistrate's jurisdiction conditional on the validity of those steps, and this might create intolerable difficulties; and he refers me to *Clive Road Board v. Guy* ((1890) 9 N.Z.L.R. 521, 523). In that case, which is under a different statute, the Court held that the decision of the Council as to the stopping of a road was final. In this case, I am called on, not to determine the legality of the stopping of the street after everything has been done, but to interfere during the process, because the requirements of the law on which the power of the Council to stop the street are based have not been observed. I do not think that the Council can say that it is intolerable that it should be prevented from stopping part of this street when it cannot prove that it has taken the steps the law says must first be taken. I have considered all the other cases quoted by Mr. Grey on this branch of his argument, and do not think they affect the principles to be applied to the present facts.

Mr. Grey finally asked that the proceedings be dismissed for want of notice under s. 361 of the Municipal Corporations Act, 1933. I think these proceedings come within the class referred to by *Reed, J.*, in *Broad v. Tauranga County* ([1928] N.Z.L.R. 702, 708), where he quotes *Stringer, J.*, in *Grigg v. Auckland Electric-power Board* ([1925] N.Z.L.R. 184) as considering that the class of case not within the subsection is that in which, by requiring notice to be given, "individual rights or statutory provisions might be defeated" (*ibid.*, 187).

I therefore order that a writ of prohibition do issue on behalf of the plaintiff against the defendant in accordance with the terms of the motion. In my opinion, it is unfortunate that a matter of this sort could not have been settled without Court proceedings, but I am not prepared to vary the ordinary rule as to costs. I therefore allow the plaintiff costs against the defendant Corporation £20, with Court fees to be fixed by the



Registrar. The learned Magistrate, the other defendant, as was proper, took no part in the proceedings. I reserve the question of costs (if any) against the second-named plaintiff, who had discontinued before the commencement of the hearing. If necessary, the formal order and writ may be referred to me to settle, although I imagine it may not be necessary to issue and serve the writ. 5

*Order accordingly.*

Solicitors for the plaintiff: *Percy Thomson and Hugh D. Thomson* (Stratford).

Solicitor for the defendant: *Philip Grey* (New Plymouth).

## HAWKE'S BAY ELECTRIC-POWER BOARD v. HEENEY.

SUPREME COURT. Napier. 1951. May 11, 14. HAY, J.

*Electric-power Board—Notice of Intention to enter and erect Electric-power Transmission-lines—Such Notice a Nullity if issued before Board's obtaining Order in Council—"Necessary preliminary steps"—Electric-power Boards Act, 1925, ss. 76, 77, 88.*

In the term "necessary preliminary steps," as used in s. 77 of the Electric-power Boards Act, 1925, the word "preliminary" is used in the sense of "preparatory," and the section is intended to refer to the administration work which would be expected to take place in the preparation of a scheme for the future construction of electric works to lay before the Department for the purpose of obtaining an Order in Council authorizing the purchase or construction of electric works.

A notice to the occupier of land under s. 88 of the Electric-power Boards Act, 1925, of intention to enter upon the land for the purpose of erecting electric-power transmission-lines is not such a "preliminary step"; and such a notice is a nullity if, at the time when the notice was given, neither an Order in Council under s. 76 of the Electric-power Boards Act, 1925, authorizing the Board to construct a transmission-line nor an Order in Council under s. 319 of the Public Works Act, 1928, authorizing the Board to lay, construct, put up, place, or use the transmission-line, had been issued; because it is a condition precedent to the giving of a valid notice under s. 88 that the erection of the transmission-line has been authorized by an Order in Council.

ACTION in which the plaintiff Board sought, first, a declaration that a certain notice given by it to the defendant on March 13, 1951, was a valid and effective notice under s. 88 of the Electric-power Boards Act, 1925, and, secondly, an injunction restraining the defendant from taking proceedings against the plaintiff in pursuance of a notice given by the defendant on April 20, 1951, of his intention to commence proceedings to restrain the plaintiff from entering, occupying, or using his land for the purposes of the construction of electric works. It was agreed by counsel that the decision in this action should apply to and govern another and parallel action, *Hawke's Bay Electric-power Board v. Burns*, brought on for hearing at the same time. 5 10

The facts were not in dispute, and no evidence was called, counsel agreeing to the perusal by the Court of the plaintiff's file of correspondence in connection with the matter.

These facts sufficiently appear from the judgment.

*Woodhouse*, for the plaintiff.

*Pledger and Wayne*, for the defendant.

*Cur. adv. vult.*

- 5 HAY, J. The plaintiff Board, in carrying out its statutory functions, made arrangements with the State Hydro-electric Department for the installation of a second point of supply to Hastings and Havelock North by the erection of what is known as the Fernhill substation. This substation is in addition to the existing substation at Redcliffe, and its  
10 erection is either completed or nearing completion. According to a recent statement made by the Chairman of the Board, the question of conveying the power from the substation in an easterly and south-easterly direction presented some difficulty. There was first investigated the possibility of erecting a substantial line along Omaha Road to Stortford  
15 Lodge, but this project necessitated the cutting down of some hundreds of trees used as shelter belts for orchards, and was abandoned by reason of the disastrous effect it would have on the orchards. There being only one road between the Fernhill installation and the Hastings-Havelock North district, the only alternative was to take the transmission-line  
20 across country. A thorough investigation was made as to the possible routes, with the result that, out of the three that were prospected, the Board decided upon the one that traverses the defendant's property. It was strongly recommended by the Board's chief engineer, and is regarded by the Board as the best route. I am satisfied that the Board  
25 not only made the most thorough investigation of all practicable routes, but also, before coming to its decision, gave every reasonable consideration to the interests of property-owners. Furthermore, there was no secrecy as to its intentions with regard to the route. As far back as December 5, 1950, notices of intention to survey were sent to the owners  
30 of properties. Following the issue of such notices, the matter was taken up by Federated Farmers on behalf of the property-owners, and, at the request of that body, the Board attended a meeting of the owners, when the whole matter was frankly and freely discussed. At that meeting, an alternative route was suggested, which was at once inspected by the  
35 Board's officials, but without proving to be acceptable.

On March 12, 1951, a notice in the following form was sent by the Board to the defendant by registered post, being received by him on the following day :

- 40 Please take notice that at the expiration of twenty one days from the day this notice will reach you in the due course of the post, my Board intends to enter upon that portion of the land shown on the enclosed plan of which you are the owner for the purpose of erecting electric-power transmission-lines. The site where it is proposed to erect the power poles is indicated on the plan.

- 45 This notice was issued pursuant to s. 88 of the Electric-power Boards Act, 1925 (as amended by s. 15 of the Electric-power Boards Amendment Act, 1927), which reads as follows :

88. (1) The engineer or other person having charge of the electric works shall, before occupying or using any land pursuant to any authority, and except in the case of accident to the electric works requiring immediate repair, give to the owner  
50 or occupier thereof not less than twenty-one days' notice in writing, and shall state in such notice the use proposed to be made of such land.

- (2) The said owner or occupier may within ten days after receiving such notice, and after giving notice to the said engineer or other person of his intention so to do, apply to any Justice, who may thereupon summon such engineer or other person  
55 to appear before two Justices at a time and place to be named in the summons.

(3) If it appears to the Justices that the use proposed to be made of the said land is unreasonable and unnecessary, or that other neighbouring lands are more fitting to be used for the purpose proposed, the Justices may, by writing under their hands, order that the land in question shall not be occupied or used in the manner proposed.

(4) If it appears to the Justices that the use proposed to be made of the said land is reasonable and necessary they may in like manner order that the said land may be occupied and used, or material taken therefrom, in such manner and to such extent only and subject to such limitations and restrictions as they think fit; and all persons concerned shall be bound by any such order.

It is common ground that the transmission-line proposed to be erected by the plaintiff Board across the defendant's property is an "electric work" within the meaning of the Act, and is also an "electric line" within the meaning of s. 319 of the Public Works Act, 1928, and that, at the time when the above notice was given to the defendant, neither an Order in Council under s. 76 of the Electric-power Boards Act, 1925, authorizing the Board to construct the transmission-line nor an Order in Council under s. 319 of the Public Works Act, 1928, authorizing the Board to lay, construct, put up, place, or use the transmission-line had been issued. The defendant contends that it is a condition precedent to the giving of a valid notice under s. 88 that the erection of the transmission-line be authorized by an Order in Council, and, accordingly, that the notice is a nullity. On the other hand, the Board, whilst admitting that the authority of an Order in Council is a condition precedent to its actual occupation and use of the defendant's land for the purposes of the electric work, contends that the obtaining of the Order in Council is not a condition precedent to the giving of a notice under s. 88, and that the notice given by it to the defendant is, accordingly, a valid notice. It relies in particular upon the provisions of s. 77 of the Electric-power Boards Act, 1925, which is to the effect that, notwithstanding anything contained in s. 76, an electric-power board, before obtaining the Order in Council referred to therein, may take all necessary preliminary steps for the future construction and purchase of electric works. The question of law thus arising is of particular concern to the defendant, who failed, within the ten days specified in s. 88 (2) (such failure being largely excusable, owing to the special circumstances which existed), to make his application to a Justice. Counsel are agreed on the point that the provisions of s. 88 (2) as to the ten days are mandatory, and that there is no statutory power to extend the time.

The question for determination in these proceedings depends for its answer upon the interpretation of the Act under which the Board is constituted. In my opinion, that answer is plain from the language of the statute itself. The fundamental rule of interpretation (as stated in *Maxwell on the Interpretation of Statutes*, 9th Ed. I, 2) is that a statute is to be expounded "according to the intent of them that made it"; and, if the words of the statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature. Here, we are concerned with those provisions of the Electric-power Boards Act, 1925, which deal with the construction or purchase of electric works. The dominant section is s. 76, which lays down the fundamental principle that it shall not be lawful for an Electric-power Board to purchase or commence the construction of electric works, or to enter into any contract, matter, or thing authorized by the Act to be done in or about the purchase or construction of electric works, except with the authority of the Governor-General by Order in Council, and pursuant to such conditions as may be prescribed

in that behalf by the Governor-General in Council. Then follows s. 77, giving the Board power to take all preliminary steps in anticipation of obtaining the Order in Council. Section 78 (which is complementary to s. 76) gives the Board power, on the issue of the Order in Council, to purchase, construct, and maintain the electric works, and to enter into contracts in connection therewith. Authority is conferred by s. 80 to enter upon any land (whether before or after the issue of the Order in Council) for the purpose of making surveys or inspections for the proposed works, notice being given to the owner or occupier before such entry is made. Section 81 provides generally that, subject to the provisions of the Act, the Board may exercise all or any of the powers conferred by the Act for the purchase or construction of the electric works, and may take and hold all the lands required therefor, and temporarily occupy and use adjoining lands during construction or for the purposes of maintenance. The general powers of the Board with respect to authorized works are enumerated in detail in s. 82, whilst s. 83 gives additional powers with respect to selling water and planting trees. By way of further addition, s. 84 sets out in detail the powers of the Board with respect to private lands. Then follow provisions in ss. 85, 86, and 87 which are not material for present purposes. After all those provisions, which deal comprehensively with the initiation of any scheme of electric works, there appears s. 88, which is not in any way concerned with the preparation of the scheme, but is designed on its face for the protection of individual property rights upon the scheme being put into operation. The language of the section makes it clear that the stage at which it applies is subsequent to the final preparation of the scheme and its authorization by Order in Council. That necessarily follows from the opening words of the section, because there can be no engineer or other person in charge of electric works which have not been authorized pursuant to s. 76, and which, in the absence of such authority, would be illegal. Moreover, the whole tenor of s. 88 (1) is opposed to the view that the notice required in terms thereof can properly be issued before the Order in Council has been obtained. It will be seen in the first place that the notice is to be given, not by the Board itself, but by the engineer or other person having charge of the electric works. That alone is a plain indication that the scheme must by that time have passed the stage of preparation. In the next place, the notice is to be given by the person in charge of the works before occupying or using any land pursuant to any authority. To my mind, this presupposes the existence of the authority, not only at the time of entry on the land, but also at the time of the giving of the notice. In the context in which the word "authority" occurs in s. 88 (1), I am inclined to the view that it must, by implication, be deemed to mean the authority that would be vested in the Board by an Order in Council under s. 76. My reason for that view is that the authority of the Board itself to the engineer or other person is already sufficiently implicit in the words "having charge." It is, however, unnecessary to decide the point, as, whatever the connotation of "authority" in s. 88 (1), it must in any case be a lawful authority; and the Board in the present instance had no lawful right, at the time the notice was given, to place any person in charge of electric works, which it had then no power to undertake.

It necessarily follows from what I have said that the notice given by the Board to the defendant does not come within the category of "necessary preliminary steps" for the purposes of s. 77. I agree with the submission of counsel for the defendant that the true sense in which the word "preliminary" is used in that section is "preparatory," and

that the section is intended to refer to the administrative work which would be expected to take place in the preparation of a scheme to lay before the Department for the purpose of obtaining an Order in Council. The implementation of a scheme authorized by an Order in Council is an entirely different matter, and on no possible construction of the Act can steps rendered necessary in the process of implementation be regarded as preliminary steps for the future construction of electric works. To give such a construction to s. 88 would, in my opinion, be doing violence to the plain language and intention of the Act. 5

It is not without reluctance that I have come to the conclusion that the Board cannot succeed in its action because of the invalidity of its notice to the defendant. I am, however, impelled to that conclusion by what appears to me to be the true legal position. The Board has acted throughout in perfect good faith in the promotion of a scheme which has been in contemplation for a number of years, and has now become urgently necessary in the interests of its consumers. It went forward to the implementation of the scheme in the belief that it had the necessary authority in past Orders in Council, and came to realize that fresh authority of that kind was needed only when its powers were questioned subsequent to its decision to proceed with the construction, and subsequent to the issue of notices to the property-owners affected. Happily, the position has now been rectified by the issue of the necessary Order in Council, and little delay should be occasioned by the giving of fresh notices and the disposal of any objections pursuant to s. 88. That section, after all, is limited in its application to minor details of the scheme, and does not involve any interference with the scheme as a whole. 10 15 20 25

For the reasons given, the plaintiff's claim to the relief sought must be dismissed and judgment entered for the defendant, with costs according to scale as on a claim of £250, together with disbursements as fixed by the Registrar, and the costs of second counsel, which are certified for at £6 6s. 30

*Judgment for the defendant.*

Solicitors for the plaintiff: *Lusk, Willis, Sproule, and Woodhouse (Napier).*

Solicitors for the defendant: *Kelly, McNeil, and Co. (Hastings).*

### SADLER v. PALMERSTON NORTH CITY CORPORATION.

SUPREME COURT. Palmerston North. 1951. March 5; April 12. HUTCHISON, J.

*Transport—Omnibus-driver's Licence—Application to Local Authority—Adverse Police Report as to Applicant's Suitability as Omnibus-driver—Refusal of Such Licence—Council not delegating Its Power under Regulations to Police Department—Further Consideration by Council's Transit Committee of Reports by Police and by Transit Controller—Committee recommending adherence to Council's Refusal of Licence—Consideration of Applicant's Suitability not required to be Quasi-judicial—Sufficiency of Inquiry not Reviewable by Court—Transport Act, 1949, s. 30—Motor-drivers Regulations, 1940 (Serial Nos. 1940/73, 1943/101), Reg. 6 (1).*

The plaintiff applied to the Council of the defendant Corporation in May, 1950, for an omnibus-driver's licence, to enable him to accept a position which was available to him. When he made his application, the officer of the City Council directed him, in accordance with the Council's practice, to take his application to the Police Station, so that a report might be obtained from the Police as to his suitability as an omnibus-driver. The Police reported that he was not a suitable person to hold an omnibus-driver's licence. He was advised that a licence would not be granted to him, because of this adverse report.

On requests for a further inquiry, the Corporation's Transit Controller reported that a firm which had previously employed the plaintiff considered him to be a dangerous driver and a menace on the road. The matter came before the Council's Transit Committee, which, after consideration of the Police report and the written report of the Transit Controller and his further verbal report, recommended to the Council that the previous decision to decline an omnibus-driver's licence to the plaintiff should stand.

On application for a writ of mandamus directing the defendant Corporation to hear and determine the application of the plaintiff for an omnibus-driver's licence under the Motor-drivers Regulations, 1940,

*Held*, 1. That the action of the Council when it first refused the application was not a mere delegation to the Police Department of its power under the Regulations.

2. That the effect of s. 30 of the Transport Act, 1949, together with Reg. 6 (1) of the Motor-drivers Regulations, 1940, as amended, is that the local authority must consider an application for a licence; and, as it may cause to be made "such other inquiries as it thinks fit with reference to the suitability of the applicant," its consideration of the question as to suitability is not required to be quasi-judicial consideration; and the Court may not inquire into the sufficiency of the Council's inquiries.

*Randall v. Northcote Corporation* (1910) 11 C.L.R. 100 followed

3. That, accordingly, the City Council had not failed to consider the plaintiff's application according to law.

MOTION for a writ of mandamus directing the defendant to hear and determine the application of the plaintiff for an omnibus-driver's licence under the Motor-drivers Regulations, 1940.

The plaintiff applied to the Council of the defendant Corporation in 5 May, 1950, for an omnibus-driver's licence, to enable him to accept a position which was available to him. The Council refused such application.

The statement of claim set out:

6. The said application was not heard and determined by the defendant on 10 its merits and it merely delegated its power under the above Regulations to the Police Department without itself exercising the discretion vested in it.

7. The plaintiff has a legal right to have the application for the aforesaid licence heard and determined by the defendant but the defendant has refused and still refuses to hear and determine the said application on its merits.

15 The evidence showed that, when the plaintiff made his application, an officer of the City Corporation directed the plaintiff, in accordance with the Council's practice in such cases, to take his application to the Police Station, so that a report might be obtained from the Police as to the suitability of the plaintiff as an omnibus-driver. The Police report, 20 signed by the Superintendent at Palmerston North, said:

I wish to inform you that I have had inquiries made re the above-named application, and find that as a result of these inquiries Sadler is not a suitable person to hold an omnibus-driver's licence.

I therefore have no recommendation to make.

25 In June, the plaintiff was advised that the licence sought would not be granted to him, because of the adverse report by the Police Department. The secretary of the New Zealand Road Transport and Motor and Horse Drivers and their Assistants' Industrial Association of Workers then, on behalf of the plaintiff, wrote to the Town Clerk, who replied 30 that the application was referred to the Superintendent of Police, who had informed the Council that, as a result of inquiries made, he did not consider the plaintiff a suitable person to hold an omnibus-driver's licence, and that the Council therefore acted on such information. The plaintiff's solicitors on July 27, 1950, wrote to the Town Clerk. In the course 35 of their letter, they said:

Our instructions are to test the matter in the appropriate Court but we are reluctant to take any steps in this direction if the circumstances placed before your Council are such as to indicate that the decision made was a reasonable one; and we feel that your Council would be happy to place us in a position to enable us to advise our client to accept their decision. We would accordingly be pleased to receive from you full details of the report of the Superintendent of Police together with some indication of the avenues in which his inquiries were pursued so that the question of appropriate proceedings may be considered.

As a result of these letters from the secretary of the Association and the solicitors, a further inquiry was made by the Corporation's Transit Controller, who reported the result of his inquiry. This inquiry revealed, on information from a firm which had previously employed the plaintiff (but which was apparently understood by the Controller to be the then present employer of the plaintiff), that the plaintiff was considered to be a dangerous driver and a menace on the road, and that his work-mates would not ride in a vehicle driven by him. The matter came before the Transit Committee of the City Council on August 14. After consideration of the Police report, the written report of the Transit Controller, and his further verbal report (he being present at the meeting), the Committee recommended to the Council that its previous decision declining an omnibus-driver's licence to the plaintiff should stand. The minutes of the Council meeting of August 28 record:

That Messrs. McGavin and MacGoun wrote in reference to the application by A. A. F. Sadler for an omnibus-driver's licence which has been refused and it was decided they be advised that the Council's decision has been reached after consideration both of the Police report and also after taking other circumstances into account and that the Council, after further consideration is not prepared to grant the licence.

On August 29, the Town Clerk replied to the letter of the plaintiff's solicitors:

I am directed to acknowledge receipt of yours of the 27th ultimo in reference to the application of the above-named for an omnibus-driver's licence recently refused and in reply I am instructed to advise you that the Council's decision has been reached after consideration both of the Police report and also after taking other circumstances into account and in view of all circumstances the Council is therefore not prepared to grant a licence to your client.

To this letter the plaintiff's solicitors replied on September 7 inquiring whether the reference to "other circumstances" indicated that the Council had further considered the matter, and, if so, they asked to be advised of the "other circumstances." The letter went on to say that, if no further consideration had been given to the matter, the solicitors were of the opinion that the Council had not properly discharged its duties, and that, failing advice that the matter had been properly heard, it was proposed to apply to the Court for a writ of mandamus. There was no reply to this. Proceedings were commenced in November.

*McGavin*, for the plaintiff.

*J. A. L. Bennett*, for the defendant.

*Cur. adv. vult.*

HUTCHISON, J. [After stating the facts, as above:] It does not seem to me that, however it is looked at, the action of the Council, at the time of the first refusal of the plaintiff's application, may be said, as is alleged, to have been merely delegating its power under the Regulations to the Police Department. A Police report was obtained, but it was the Council or an officer of the Corporation, upon receipt of this report, that first refused the application. It may well be that the first refusal was made by an officer of the Corporation. This would seem to be a

reasonable inference from the fact that no resolution of the Council, or of any Committee of the Council, is quoted as at any time earlier than August. Whether it would be competent or proper for the Council to delegate to an officer the power to deal with an application for an omnibus-driver's licence is a matter on which I express no view, because the question does not arise in this case, as, whatever the position was in June, the matter was in August dealt with first by the Transit Committee and then by the Council itself. In the absence of a reply to the last letter of the plaintiff's solicitors to the Town Clerk, it was not known to the plaintiff or his advisers, when the proceedings were commenced, in what way, if at all, the matter had been further considered after the first refusal of the application. On the evidence as available at the hearing, counsel for the plaintiff was properly satisfied that the allegation contained in para. 6 of the statement of claim could not be supported, and confined his case to the allegation contained in para. 7. Section 30 of the Transport Act, 1949, replacing s. 21 of the Motor-vehicles Act, 1924, provides, in part, as follows :

(1) Any local authority may, on payment of a fee of five shillings, issue a motor-driver's licence to any person who satisfies the local authority that he is qualified in accordance with this Act and with any regulations made under this Act to be the holder of a motor-driver's licence.

The Motor-drivers Regulations, 1940, made under the Motor-vehicles Act, 1924, prescribe the various classes of licences, how applications are to be made, the qualifications which are required of motor-drivers before licences may be issued to them, and various other detailed matters concerning licences. Regulation 6 (1), as amended by Reg. 4 of the Motor-drivers Regulations, 1940, Amendment No. 1, 1943 (Serial No. 1943/101), provides as follows :

Before the issue of a licence to drive a taxicab or motor-omnibus the issuing authority shall cause to be made such inquiries as it thinks proper as to the character of the applicant, and shall require a satisfactory certificate of character signed by a reputable person to be furnished to it, and shall not issue the licence unless it is satisfied that the applicant is a person of good character. The issuing authority may also cause to be made such other inquiries as it thinks fit with reference to the suitability of the applicant to act as the driver of a taxicab or motor-omnibus, and may, if it thinks fit, apply to any constable for his opinion thereon.

The submission for the plaintiff was that the effect of the statutory provision and the Regulation was that, assuming the technical competence of the plaintiff as a driver and his passing the necessary medical tests (neither of which was doubted), when he came to apply for an omnibus-driver's licence, the Council was first required to be satisfied as to his character (and there is nothing against his character), and that it might then make such other inquiries as it thought fit with reference to his suitability ; but that it was contrary to natural justice that, if the Council inquired as to his suitability, it did not go far enough to enable a complete decision to be made. Here it was said that the inquiry, did not go far enough because no inquiry was made of the Transport Department, which controls traffic in the City of Palmerston North, and because the further inquiry made by the Transit Controller was made of a former employer of the applicant, and not of the then present employer. It was said that a past employer might be prejudiced against a man who had left his employment, and that members of the Council, when they came to consider the application, might well have been impressed with an unfavourable report from an employer on the basis that they thought it was obtained from the present employer, whereas, in fact, it had been obtained from a former employer. It was said, too, that, where the only source of information was such as in this case, the plaintiff was entitled



to an opportunity to make submissions to the Council or the Transit Committee as to the allegations against him.

For the defendant, it was said that it is mandatory on the Council under the Regulation to satisfy itself as to the good character of the applicant, but that it is discretionary whether it makes any inquiries as to his suitability to act as the driver of an omnibus, with the particular indication that it may apply to any constable for his opinion. It was said that there was no contravention of the law by the Council, no *mala fides* on its part, no delegation of authority, and no failure to consider and determine the application of the plaintiff.

Ultimately, and necessarily, the sole question in issue was whether there was a proper consideration and determination by the Council of the plaintiff's application. On that, I have no reasonable doubt. The Council obtained a report from the Police; it obtained a report from its own Transit Controller; both of these were adverse to the plaintiff, who, it was indicated, was a dangerous driver. Where the Regulation provides that the issuing authority may cause to be made "such other inquiries as it thinks fit" with regard to the suitability of the applicant, it seems to me to be impossible to argue that, because the City Council did not have a report from the Transport Department, its decision may be challenged. Nor do I think that the fact that the person from whom the inquiry was made by the Transit Controller was a past employer, and not the present employer, is a matter that justifies a challenge to the decision of the Council made under the terms of this Regulation. As regards the argument that the plaintiff should have been given an opportunity to make submissions before the Council or its Committee with respect to the allegations against him, counsel for the plaintiff agreed that, in what he called a normal case, the applicant could hardly expect to be heard in opposition to reports obtained by the local authority. It was agreed by counsel that the function of the local authority in dealing with such an application as this is the same as that of the respondent in *Randall v. Northcote Corporation* (1910) 11 C.L.R. 100 as stated by *Higgins, J.*: "I am of opinion that there is not imposed on the Council the duty to hear and determine, in the judicial sense, at all. It is the duty of the Council to consider the application, and to decide whether it ought to be granted. There is no duty to 'hear' the applicant and his evidence, or any opponents and their evidence. The Council is in a position analogous to that of trustees. As it is the duty of trustees to exercise their powers with a view to the interest of their beneficiaries as prescribed by the will, so it is the duty of the Council to exercise its powers with a view to the interest of the public—in particular, the public of the town—as prescribed by the Act; but in the one case there is no obligation to 'hear' the beneficiaries; and in the other case there is no obligation to 'hear' the public or the applicant" (*ibid.*, 119).

With that view I, too, am in agreement. The local authority must consider the application; but the provision of Reg. 6 (1) that it may cause to be made "such other inquiries as it thinks fit with reference to the suitability of the applicant" seems to me to show that its consideration of the question of his suitability is not required to be a quasi-judicial consideration. There is a sharp contrast between Reg. 6 (1) and Reg. 6 (2) and (3), which latter clauses relate to proceedings to revoke an omnibus-driver's licence already held, and which prescribe a judicial, or quasi-judicial, procedure. Counsel for the plaintiff, however, argued that the plaintiff could in this case properly expect to be heard because of the fact that the City Council's inquiries were, in his submission, in-

sufficient. I do not think, on the wording of Reg. 6 (1), that their sufficiency may be inquired into by the Court.

In my opinion, the City Council has not failed to consider the plaintiff's application according to law. The motion will, therefore, be dismissed.

As regards costs, it seems to me that, if the Council had replied to the last letter of the plaintiff's solicitors and told them what had been done by the Council, the proceedings might not have been taken. On the other hand, all the facts were on affidavit before the case was argued.  
10 In the circumstances, the defendant will be allowed its costs on a reduced basis, and I fix them at £12 12s. with disbursements.

*Motion dismissed.*

Solicitors for the plaintiff: *McGavin and MacGoun* (Wellington).

Solicitors for the defendant: *Cooper, Rapley, Rutherford, and Bennett* (Palmerston North).

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[IN THE COURT OF APPEAL.]

# FARRELL v. NORTH CANTERBURY HOSPITAL BOARD.

COURT OF APPEAL. Wellington. 1951. April 10, 30. GRESSON, J.; STANTON, J.; HAY, J.

*Workers' Compensation—Accident Arising Out of and in the Course of Employment—Tuberculosis—Worker employed by Hospital Board—Presumption of having contracted Tuberculosis while so employed—Duties or Classes of Duties prescribed by Regulations declaratory of Class of Persons to whom Presumption applies—Worker entitled to Compensation—Date from which Presumption operates—Workers' Compensation Act, 1922, s. 10—Tuberculosis Act, 1948, s. 23 (2)—Tuberculosis Regulations, 1949 (Serial No. 1949/138), Reg. 19.*

F., who was free of tuberculosis, commenced work as a porter with the defendant Board on October 9, 1946, and he was continuously employed by it in the Cashmere Sanatorium until September 20, 1948, on which date he became totally incapacitated for work through having contracted the disease. Early in 1948, he began to associate with a female patient of the Sanatorium, and became engaged to her at Easter of that year. He was infected with tuberculosis by the following June or July. By reason of the tuberculosis, he was totally incapacitated for work from September 20, 1948, to September 5, 1949. He was paid full wages to October 19, 1948, and claimed compensation for the balance of the incapacity period. On September 5, 1949, he returned to his work with the Board, and he had not lost any wages since then. The disease had left him permanently unfit for heavy work and with an increased risk of infection; and he claimed compensation accordingly. He was not able to show by evidence that the tuberculosis which incapacitated him was due to the nature of his employment.

The Tuberculosis Act, 1948, operated from April 1, 1949; and the Tuberculosis Regulations, 1949, came into force on September 15, 1949: and, under Reg. 19, the plaintiff's duties were "prescribed" to come within s. 23 (1) of the statute.

On case stated by the Judge of the Compensation Court for the opinion of the Court of Appeal on the question whether the presumption created by s. 23 (2) applied to the plaintiff's case, and, if so, from what date,

*Held*, by the Court of Appeal, 1. That Reg. 19 of the Tuberculosis Regulations, 1949, is definitive or declaratory of a class of persons envisaged by s. 23 (1) of the Tuberculosis Act, 1948, and accordingly has the same effect as though its terms had been embodied in s. 23 itself.

2. That the presumption created by s. 23 (2) of the Tuberculosis Act, 1948, applied to the plaintiff's case as from April 1, 1949, the date on which that statute came into force.

CASE STATED by the Judge of the Compensation Court under Chapter VIII (5) of the Workers' Compensation Rules, 1939, for the opinion of the Court of Appeal. It involved the construction of s. 23 of the Tuberculosis Act, 1948.

The plaintiff was seeking compensation under the Workers' Compensation Act, 1922, on the ground that he contracted tuberculosis while employed as a porter by the defendant Board. His service commenced on October 9, 1946, he being then free of the disease. He was continuously employed at the Cashmere Sanatorium, Christchurch, until September 20, 1948, on which date he became totally incapacitated for work through having contracted the disease. Early in 1948, he began a friendship with a female patient of the Sanatorium, to whom he became engaged at Easter of that year. He was tuberculosis-infected by the following June or July. The period of total incapacity extended from September 20, 1948, until September 5, 1949, on which latter date the plaintiff returned to his work with the Board, and had since continued in full employment. The disease had left him permanently unfit for heavy work and with an increased risk of infection, and there would accordingly be a claim based on permanent partial incapacity.

The question for the opinion of the Court of Appeal is: Does the presumption created by s. 23 (2) apply to plaintiff's case, and, if so, from what date?

*Barrer*, for the plaintiff. The Court is asked to decide whether or not the plaintiff is to get the benefit of the presumption laid down under the Tuberculosis Act, 1948, as amplified by the Tuberculosis Regulations, 1949. Pursuant to the provisions of s. 10 of the Workers' Compensation Act, 1922, the onus ordinarily would be on the plaintiff to prove that he contracted tuberculosis in the course of his employment. The Tuberculosis Act, 1948, however, was passed by the Legislature on November 12, 1948, with effect as from April 1, 1949; and s. 23 of that statute provides, *inter alia*, that, unless the contrary be shown, a worker who contracts tuberculosis while working in a hospital such as the Cashmere Sanatorium is deemed to have contracted it in the course of his employment. The statute specifies certain classes of persons who shall get the benefit of that section, and other classes are to be specified later: see the Tuberculosis Regulations, 1949, which specify the class in which the plaintiff was; but the Regulations came into force on September 15, 1949. The statute is intended to be beneficial to the worker. Section 23 defines in part the class of persons who are to get the benefit of it (persons on nursing duties) on April 1, 1949. The Tuberculosis Regulations, 1949, are definitive or declaratory of a class which the Legislature envisaged, because it refers to them in s. 23 (1) as a class to be defined; and that class, having been defined, then steps into the same position as that in which nurses were; and their rights also became operative on April 1, 1949. Accordingly, the plaintiff is entitled to compensation as from April 1, 1949, by virtue of the presumption in favour of the plaintiff in s. 23 (2) of the statute. He is also entitled to a sum

calculated in accordance with the provisions of s. 41 (3) of the Workers' Compensation Amendment Act, 1947, by virtue of which a worker, if he has a disability of 10 per cent., whether he has a loss of earnings or not, is entitled to compensation : *Dempsey v. Public Trustee* ([1950] G.L.R. 5 328).

For the purposes of the argument, this case falls into three parts—namely, (i) the worker's period of incapacity from September 20, 1948, to April 1, 1949, in which period it is admitted that the onus of proof rested on the worker in the ordinary way, no presumption existing ; (ii) the period of total incapacity from April 1, 1949, to September 5, 1949, when the presumption existed, unless the Tuberculosis Regulations, 1949, have taken it away ; (iii) the period from September 5, 1949—i.e., the balance of the compensation period as laid down under the Workers' Compensation Amendment Act, 1947—when he is entitled to have his 20 per cent. to 25 per cent. disability assessed. Whether or not the Regulations take away his rights for the first two periods, there is nothing in the Regulations which prevents his getting compensation by virtue of s. 41 (3) of the Workers' Compensation Amendment Act, 1947, for the third period, because the Regulations themselves define his class 20 as at September 15, 1949.

As to the rule relating to the operation of statutes, see *31 Halsbury's Laws of England*, 2nd Ed. p. 513, para. 670, p. 524, paras. 654, 685. It might be suggested that some heavy retrospective financial burden is put on the employer ; but that is not so, because it is expressly provided 25 in s. 23 (5) of the Tuberculosis Act, 1948, that compensation is payable as from April 1, 1949, only. The Regulations are capable of a reasonable and fair construction, which does not make them conflict with the statute : Acts Interpretation Act, 1924, s. 5 (c) (j), which has been applied to workers' compensation cases : *In re An Agreement, Connex with* 30 *Wilton Collieries, Ltd.* ([1934] N.Z.L.R. 1029, 1032) and *In re Lovell and Collard's Contract* ([1907] 1 Ch. 249). If the Legislature had intended that District Nurses, medical officers, &c., and the persons included under Reg. 19 (j) of the Tuberculosis Regulations, 1949, were not to get the same benefits as nurses, or that they were not to get those benefits 35 so soon, it would have said so : see s. 2 of the Workers' Compensation Amendment Act, 1936. In *Roberts v. Gisborne District Land Registrar* ([1909] 28 N.Z.L.R. 616), retrospective effect was given to a statute, although the statute itself was expressed as coming into force on a particular date.

40 [To HAY, J.] No claim is put forward with respect to the first period unless, on the evidence, the Court thinks that the plaintiff has discharged his onus of proof.

*Shorland*, for the defendant. It is conceded that s. 5 (c) and (j) of the Acts Interpretation Act, 1924, is applicable to the construction of a 45 Regulation made pursuant to a statute and passed in extension of that statute ; it must be shown clearly from the language of the Regulation, or by necessary intendment, that it has a retroactive effect : *In re An Appeal by Parekaiura Parekura* ([1912] 31 N.Z.L.R. 1074, 1077). The plaintiff seeks to make his case by relying upon s. 23 (2) and (4) of 50 the Tuberculosis Act, 1948, as having retrospective effect. While it is true that the Regulations and the Act must be read as one enactment, they are to be read as operating as such on and from the date of the coming into force of the Regulations, under which the plaintiff was for the first time brought within the provisions of the statute.

A. Section 23 (4) of the Tuberculosis Act, 1948, should be construed as applying only to claimants employed in duties which, on the date of the coming into force of the Act, had been defined by the Act or otherwise prescribed, and as having no application to claimants who may have been brought within s. 23 (1).

The question is one of construction of a subsection which admittedly is expressed in terms which show that to some extent it was intended to be retrospective. The rule of construction relative to sections which are claimed to be retrospective is that those sections are not to be given greater retrospective effect than is clearly intended, or than their words make necessary. The crucial words for consideration in subs. 4 are "while employed as aforesaid." As the subsection is retrospective, those words should receive a strict construction, and should be limited in their meaning as referring to the employees indicated in s. 23 (1), because, upon close examination of the section, it becomes clear that that is in accordance with the intention of the Legislature; and any other construction would lead to startling, and, indeed, absurd, results. The Workers' Compensation Act, 1922, imposes on all claimants certain obligations in regard to giving notice of their claim as soon as possible: s. 26; and all claimants have the obligation of bringing action within six months of the date of the accident: s. 27. In the case of industrial diseases, s. 10 of the Workers' Compensation Act, 1922, provides that, for the purposes of giving notice and for the purpose of time limitations, the date of incapacity is to be taken as the date of accident. The whole scheme of s. 23 of the Tuberculosis Act, 1948, imports s. 10 of the Workers' Compensation Act, 1922, and retains those limitations.

The difficulties which would otherwise arise from enforcing the rights *prima facie* given by subs. 4 are dealt with in subs. 5, which must be read with subs. 4. Subsection 5 is evidence of the intention of the Legislature that subs. 4 shall apply only to cases arising from employment on duties within the classes of employment defined or prescribed before the date of the commencement of the Act which were to have the benefit of subs. 4. Otherwise, the result is that the Regulations came into force on September 15, 1949, which is only a fortnight after the plaintiff returned to work, and, if s. 23 (4) were applicable to a claimant brought within s. 23 for the first time by the Regulations, he would have had only fifteen days to commence his action. Unless he is expressly given the benefit of subs. 4, and unless machinery is provided which will enable him to have a fixable date for the commencement of his incapacity, he will be barred from compensation by ss. 26 and 27 of the Workers' Compensation Act, 1922. It so happens that the plaintiff became incapacitated from tuberculosis some little time before the Tuberculosis Act, 1948, came into force on April 1, 1949. Another worker in the same institution, employed on the same duties, and also coming under the Act on September 15, 1949, may have contracted his tuberculosis on April 2, 1949. Although his incapacity would be later in date than the plaintiff's, he clearly would have no retrospective rights under subs. 4, because an essential condition for the retrospective claim under that subsection is incapacity before the date of the commencement of the Act.

For those reasons, and because of the intention shown by the statute, the retrospective effect to be given to subs. 4 should be limited and confined to a strict reading of the words "while employed as aforesaid"—namely, to the occupations which are stated in subs. 1.

[GRESSON, J. To enjoy the operation of subs. 4, the person must be qualified by being designated before April 1 ?]

- The subsection being retrospective, the principle is that it is not to be considered as having greater retrospective effect than is necessary :
- 5 *Maxwell on the Interpretation of Statutes*, 9th Ed. 222, and *Reid v. Reid* (1886) 31 Ch.D. 402, 408). The presumption or rule relative to the retrospective interpretation of statutes applies to the Workers' Compensation legislation : *Clement v. D. Davis and Sons, Ltd.* ([1927] A.C. 126). Consequently, the plaintiff has not the benefit of s. 23 (4).
- 10 B. The presumption provided for in s. 23 (2) is not retrospective. Subsection 1 lays down the basis of the type of claim with which subs. 2 deals. The basic condition for liability imposed by s. 23 is "while  
"employed . . . on nursing duties or on such other duties or  
"classes of duties." The words presumably mean something more than  
15 during the mere currency of the employment, and connote contraction of the disease while the worker is employed at his duties. The question is whether subs. 2 is to have retrospective effect ; and, furthermore, whether  
subs. 2 applies to a case coming within subs. 4. There is nothing in subs. 2 to suggest that it is to have retrospective effect ; and *prima facie*, read  
20 alone, subs. 2 can apply to cases and to facts which arise only after the date of the coming into force of the Act. But, if it had been intended that retrospective claims coming within subs. 4 should have the benefit of the presumption provided for in subs. 2, then one would expect to find, not the words "has contracted tuberculosis before the date of commence-  
25 "ment of this Act," but words such as "be found to be suffering from "tuberculosis while," &c., to indicate that the presumption is to apply to the special cases arising within subs. 4. Subsection 4 shows that there is redeclared in it the need of proving that the person has, "while em-  
"ployed as aforesaid," contracted the disease before the commencement  
30 of the statute.

- Barrer*, in reply. This is a remedial and beneficial Act, and a long-range statute : see Reg. 2 (2) of the Tuberculosis Regulations, 1949. The rule of retrospective construction applies only where the words of the Act are ambiguous : *Dagnall v. Huddart Parker, Ltd.* ([1937] N.Z.L.R.  
35 522, 526).

*Cur. adv. vult.*

The judgment of the Court of Appeal was delivered by

- HAY, J. The Tuberculosis Act, 1948, was passed on November 12, 1948, but did not come into force until April 1, 1949. Its Preamble  
40 states that it is :

An Act to make better Provision for the Treatment, Care, and Assistance of Persons suffering or having suffered from Tuberculosis and for preventing the Spread of Tuberculosis.

- Section 23 (1) provides that, where any person contracts tuberculosis  
45 while employed by any Hospital Board or in any institution or service under the control of the Department of Health on nursing duties or on such other duties or classes of duties as may be prescribed, and the incapacity or death of that person results from that disease, then, notwithstanding anything contained in s. 10 of the Workers' Compensation Act,  
50 1922, compensation shall be payable under that Act in respect of such incapacity or death in all respects as if the disease were a personal injury by accident arising out of and in the course of that employment, and the provisions of that Act, including s. 10 (but excepting subs. 1 and 2 thereof), shall, so far as applicable, and with the necessary modifications, apply



date been still incapacitated as a result of the disease, claims to be entitled to the benefit of the retrospective provisions of s. 23 (4). On the other hand, it is submitted on behalf of the defendant Board that plaintiff was for the first time brought within the Act on September 15, 1949, the date of the coming into force of the Regulations, and that he is accordingly disqualified from claiming the benefit of the presumption in s. 23 (2), at least to the extent of having his compensation assessed as from April 1, 1949, when the Act came into force. The argument for the defence is that, proceeding on the principle that a provision admittedly retrospective to some extent is not to be given greater retrospective effect than is clearly intended, the proper construction of s. 23 (4) is that it applies only to such persons as were employed on duties which, on the date of the coming into operation of the Act, had been prescribed, either in the Act itself or by Regulations, as the essential qualification of a claimant. In the submission of counsel for the defendant Board, the crucial words of s. 23 (4) are "while employed as aforesaid," and plaintiff could not be said to have come within those words at the time when he contracted the disease. We think the argument is fallacious, and misconceives the effect of the provisions of subs. 1. It is stated in that subsection that the right to compensation is given to persons employed, not only "on nursing duties," but "on such other duties or classes of duties as may be prescribed." The prescription of other duties so contemplated by the section was effected in the normal manner by Regulations, and it was no more than accidental that the issue of the Regulations took place after, instead of before, the Act had become operative. In our opinion, Reg. 19 of the Regulations cannot be regarded otherwise than as definitive or declaratory of a class of persons envisaged by s. 23 (1), and, accordingly, has the same effect as though its terms had been embodied in the section itself. We are not impressed by the argument of counsel for the defendant Board that there should be taken into account on the construction of the section the consideration that other duties or classes of duties may be prescribed by future Regulations. The list set out in the present Regulations appears on its face to be comprehensive, and, in any event, there can be no gainsaying the fact that the obvious intention of the Legislature in enacting s. 23 was to afford a wide and generous right to a class of persons whose duties bring them peculiarly within the risk of infection in respect of this particular disease.

In the opinion of the Court, the answer to the question submitted is that the presumption created by s. 23 (2) applies to the plaintiff's case as from April 1, 1949.

The plaintiff is allowed costs of the proceedings in this Court on the lowest scale as from a distance, together with disbursements.

*Question answered accordingly.*

Solicitors for the plaintiff: *Barrer and Thompson* (Christchurch).  
Solicitors for the defendant: *Lane, Neave, and Wanklyn* (Christchurch).



[IN THE SUPREME COURT.]

## NIPPERT v. HAIGH.

SUPREME COURT. Wellington. 1951. March 7; April 3. HAY, J.

*Public Health—Closing-order—Shed erected 19½ ft. from Structure of Dwellinghouse—Back Yard alleged to be less than Minimum Open Space—Such Shed not an "addition"—Closing-order ultra vires—Health Act, 1920, ss. 41, 44—Municipal Corporations Act, 1933, ss. 306, 307.*

The appellant owned and occupied a house erected on a rectangular section of land having a frontage of 18 ft. 6 in. to Aro Street, in the City of Wellington, and a depth of 82 ft. 6 in. The house (of two stories) was built in 1898, in such a position as to leave a clear yard-space at the rear of the building of the full width of the section and of a depth of 29 ft. 6 in. to the back boundary. In 1949, the appellant built, at the extreme rear of the section, a shed lying almost completely across the width of the section. The open back-yard space thus left was just below the minimum required in the circumstances by s. 306 (3) of the Municipal Corporations Act, 1933.

The Wellington City Corporation, having failed in its prosecution of the appellant for erecting the shed without a permit, began proceedings against her under the closing-order provisions of the Health Act, 1920, with the object of compelling removal of the shed. A certificate was issued by the City Engineer on May 10, 1950, to the effect that the appellant's dwellinghouse was, by reason of its situation and structure, unfit for habitation, and that, to make it fit for habitation, use, or occupation, it was necessary for her to "provide" in accordance with the requirements of the Municipal Corporations Act, 1933, an open space at the rear of the dwelling, extending throughout the "entire width of the site; the minimum distance across such open space being "not less than 20 ft. from every part of the dwelling." The certificate also stated that in the opinion of the City Engineer these works could be carried out within a period of thirty days from the date of the service of the notice requiring them to be done. On May 17, 1950, a formal notice from the Town Clerk, in terms of s. 40 (2) of the Health Act, 1920, served on the appellant, and calling on her to effect or carry out the alterations and works specified in the City Engineer's certificate, was ignored. On August 11, 1950, the Corporation issued an order prohibiting the use of the appellant's premises for human habitation or occupation until the specified alterations and works had been carried out to the satisfaction of the Corporation.

The appellant was charged under s. 44 of the Health Act, 1920, with occupying on October 25, 1950, premises in respect of which a closing-order was in force, and she was convicted.

On appeal under the Justices of the Peace Act, 1927, from the conviction,

*Held*, 1. That the failure of the appellant to appeal, under s. 41 of the Health Act, 1920, against the closing-order did not prevent the Supreme Court from inquiring into its validity.

*R. v. North, Ex parte Oakley* ([1927] 1 K.B. 491), *West Ham Corporation v. Charles Benabo and Sons* ([1934] 2 K.B. 253), and *Benabo v. Wood Green Borough* ([1945] 2 All E.R. 162) followed.

*Stepney Borough Council v. John Walker and Sons, Ltd.* ([1934] A.C. 365) distinguished.

2. That the meaning of the word "addition" in s. 306 (6) of the Municipal Corporations Act, 1933, is an addition to the actual structure of the building; and, accordingly, that subsection does not apply to the erection of a shed lying 19½ ft. beyond the actual dwellinghouse.

*Quaere*, Whether s. 306 (1) of the Municipal Corporations Act, 1933, in its reference to "a new dwellinghouse" applies only to one erected after the commencement of that statute.

- APPEAL from the conviction of the appellant, who had been charged under s. 44 of the Health Act, 1920, that on October 25, 1950, she occupied premises situated at No. 55 Aro Street, Wellington, in respect of which a closing-order was in force. The information was heard by Mr. Scully, S.M., on November 23 and December 1, 1950, and, for reasons given in a reserved judgment, the learned Magistrate ordered that the appellant be convicted and fined the sum of £5, with Court costs 10s. The appellant instituted a general appeal under the Justices of the Peace Act, 1927, but, as the facts were not in dispute, they were brought before the Supreme Court in the form of an agreed statement.

- The facts were within a narrow compass. The appellant was the owner and occupier of a house, No. 55 Aro Street, erected on a rectangular section of land having a frontage of 18 ft. 6 in. to Aro Street and a depth of 82 ft. 6 in. The house (of two stories) was built in 1898. It was erected in such a position as to leave a clear yard-space at the rear of the building of the full width of the section and of a depth of 29 ft. 6 in. to the back boundary. In 1949, the appellant erected at the extreme rear of the section a shed whose outside dimensions were 18 ft. by 10 ft., and which lay almost completely across the width of the section. The shed was distant 19 ft. 6 in. from the back wall of the house, and 18 ft. 2 in. from a chimney built at the corner of that wall. The open back-yard space thus left was approximately 19 ft. 6 in. by 18 ft. 6 in., which was just below the minimum required in the circumstances by s. 306 (3) of the Municipal Corporations Act, 1933.

- The Wellington City Corporation, having failed in its prosecution of the appellant for erecting the shed without a permit, adopted the expedient of proceeding against her under the closing-order provisions of the Health Act, 1920, its objective being the removal of the shed. A certificate was issued by the City Engineer on May 10, 1950, to the effect that the appellant's dwellinghouse was, by reason of its situation and structure, unfit for habitation, and that, to make it fit for habitation, use, or occupation, there were necessary the following alterations and works

- [to] provide in accordance with the requirements of the Municipal Corporations Act, 1933, an open space at the rear of the dwelling, extending throughout the entire width of the site; the minimum distance across such open space being not less than 20 ft. from every part of the dwelling.

- The certificate also stated that, in the opinion of the City Engineer, the works could be carried out within a period of thirty days from the date of the service of the notice requiring them to be done. On May 17, 1950, a formal notice from the Town Clerk in terms of s. 40 (2) of the Health Act, 1920, was served on the appellant, calling on her to effect or carry out the alterations and works specified in the City Engineer's certificate. The notice having been ignored, the Corporation on August 11, 1950, in pursuance of the powers given to it by s. 40, made and issued an order prohibiting the use of the premises, No. 55 Aro Street, for human habitation or occupation until the alterations and works had been carried out to the satisfaction of the Council.

*Harding*, for the appellant.  
*F. H. Jones*, for the respondent.

*Cur. adv. vult.*

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HAY, J. [After setting out the facts, as above:] When a closing-order is made by a local authority, a right of appeal (to be exercised within fourteen days) is given to the owner or occupier by s. 41 of the Health

Act, 1920. The appeal is heard and determined in a Magistrate's Court by a Stipendiary Magistrate, whose decision, whether cancelling the order or confirming it, either absolutely or subject to conditions and modifications, is declared by s. 42 to be final. In the present case, the appellant refrained from exercising her right of appeal, having been advised that the closing-order was invalid.

At the hearing of the appeal, two grounds were relied upon by counsel for the respondent—namely, (i) that, the appellant having failed to exercise her right of appeal, it was not competent for this Court to go behind the closing-order, and (ii) that the closing-order was in any event invalid.

As to the first ground: Counsel for the respondent relied on the principle illustrated by *Stepney Borough Council v. John Walker and Sons, Ltd.* ([1934] A.C. 365) that, on the construction of a statute, the appeal remedy therein provided may be found to be exclusive. I agree, however, with the submission of counsel for the appellant that such a principle cannot be applied to the circumstances of the present case, because here we have a clear-cut question of *ultra vires*, which was not present in the *Stepney Borough* case. Moreover, in the latter case there was the important point of the conclusiveness of the rate-book. Here, he contended, the right of appeal would have been in respect of a closing-order which was invalid *ab initio*, and which in law did not exist. It was, therefore, void, and not merely voidable, and the appeal would have been against a nullity. I think those submissions are sound, and should be adopted for the purposes of the present case. They are in harmony with the cases of *R. v. North, Ex parte Oakley* ([1927] 1 K.B. 491, 506), *West Ham Corporation v. Charles Benabo and Sons* ([1934] 2 K.B. 253), and *Benabo v. Wood Green Borough* ([1945] 2 All E.R. 162). Counsel for the respondent in fact relied upon the last-named case as being exactly in point here, the *ultra vires* principle being present. With that contention I am unable to agree. On the contrary, I agree with counsel for the appellant that the case does not trench upon the principle which was dealt with by *Atkinson, J.*, in *West Ham Corporation v. Charles Benabo and Sons* ([1934] 2 K.B. 253). That earlier decision was in fact expressly approved in *Benabo v. Wood Green Borough* ([1945] 2 All E.R. 162, 166). I therefore hold that the failure of the appellant to appeal against the closing-order does not prevent this Court from inquiring into its validity.

As to the second ground: The closing-order depends for its validity on the applicability or otherwise of the provisions of s. 306 of the Municipal Corporations Act, 1933. That section is the foundation of the closing-order procedure adopted by the Corporation in the present instance, for it is linked to the Health Act, 1920, by virtue of s. 307, which provides (*inter alia*) that a dwellinghouse which is not in accordance with the provisions of s. 306 shall be deemed to be unfit for occupation, and shall be dealt with under the Health Act, 1920, accordingly. Counsel for the respondent admitted (and, in my opinion, correctly) that the dwellinghouse in the present case was not a "new dwellinghouse" within the meaning of s. 306, and that the provisions of s. 307 (2) could not be deemed to apply to other than a "new dwellinghouse." The expression "new dwelling-house" is not defined in the Act. The provisions equivalent to s. 306 first appeared in the Act of 1900, and have been repeated in all subsequent consolidations. As the appellant's dwellinghouse was erected in 1898 (a fact which was not before the learned Magistrate in the Court below), it could never have been a new dwellinghouse for the purposes of the

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statute, even assuming the learned Magistrate to be right in his opinion that the new dwellinghouse referred to in s. 306 is one either erected since the provision was first enacted in 1900 or re-erected, converted, or altered since that date in any of the modes specified in subs. 7 of s. 306.

5 There may, indeed, be grave doubt as to the correctness of that view, as the language of s. 306 leaves it open to the construction that the section applies to erections after the commencement of the Act. I am expressing no opinion on the point, as it is not relevant for the purposes of the case.

Counsel for the respondent was, in the circumstances, driven to  
10 contend that s. 307 (2) still applied because of the provisions of subs. 6 and 7 of s. 306. Subsection 6 provides that, where any alteration or addition is made to any dwellinghouse (whether erected before or after the commencement of the Act), the open space attached to such dwellinghouse shall not be diminished by such alteration or addition so as to leave  
15 a smaller area than is required by s. 306 to be provided. He conceded that there was no authority as to what an "addition" meant, but contended that some support for the view that it did not necessarily mean an addition actually forming part of the structure was to be found in the use of the word "attached" in subs. 3. The argument was that, as  
20 in 1900 (when subs. 3 was originally framed) sheds and outbuildings were usually not physically attached to the dwellinghouse, the word "attached" must be read as meaning "somewhere on the section." Such an argument is no more convincing than the reliance by counsel for the respondent on the definition of "dwelling" in s. 2 of the Health  
25 Act, 1920, and of "house" in the Housing Improvement Act, 1945. I agree with the submission of counsel for the appellant that the test of the meaning of the word "addition" in subs. 6 is the ordinary sense of the word, and that no artificial definition can be invoked. It appears to me that the plain and natural meaning of an addition to a dwelling-  
30 house is an addition to the actual structure of the building, and that the words of the subsection are not to be satisfied by the erection of a shed lying 19 ft. 6 in. beyond it. The argument of counsel for the respondent based on subs. 7 depends on the words appearing therein ("or an "addition to . . . an existing dwellinghouse"), and must, in my  
35 opinion, fail for the same reasons.

The closing-order issued by the Corporation is accordingly invalid and of no effect, and the appellant is entitled to succeed in her appeal. The conviction is quashed, with costs £15 15s. and disbursements to the appellant.

*Appeal allowed.*

Solicitors for the appellant: *Webb, Richmond, and Bryan* (Wellington);  
Solicitor for the respondent: *City Solicitor* (Wellington).

# ATTORNEY-GENERAL, *Ex relatione* BRADSHAW AND ANOTHER v. PENINSULA COUNTY.

SUPREME COURT. Dunedin. 1950. October 20. 1951. January 29.  
HUTCHISON, J.

*Counties—Ridings Representation—Readjustment of Representation in General Election Year—Urban and Farming Portions of County—"As far as possible"—Counties Act, 1920, s. 60—Local Elections and Polls Amendment Act, 1946, s. 2 (9).*

Section 60 of the Counties Act, 1920, calls for an adjustment, as far as possible, of representation triennially when any substantial disproportion manifests itself in the representation of the several ridings, having regard to the rateable value and number of electors in each riding.

The words "as far as possible," used in the section, recognize that there will be cases where it is not possible to make any reasonably precise adjustment; this may arise from the difficulty of reconciling the two factors to which the representation is to be proportioned.

MOTION by the Attorney-General, on the relation of two ratepayers and electors of the North East Harbour Riding of the County of Peninsula, for a writ of mandamus directed to the Council of the defendant Corporation commanding the Council to adjust the representation on the Council of the ridings of the County so as to proportion the same as far as possible to the rateable value and number of electors in each riding respectively, and to do all things necessary to effect such adjustment. 5

The representation of the ridings, the respective numbers of electors in each riding, and the rateable values of the ridings as at March, 1950, were set out in the following table: 10

<i>Name of Riding</i>	<i>Number of Councillors for Riding</i>	<i>Number of Electors in Riding</i>	<i>Rateable Value of Riding</i>
Otago Heads ..	1	154	£76,740
Sandymount ..	1	73	£56,310
Highcliff ..	1	106	£80,410
Tomahawk ..	1	296	£63,422
North East Harbour	2	1,034	£299,005
Broad Bay ..	2	662	£147,450
Portobello ..	1	201	£85,075
	9	2,526	£808,412

The further relevant facts sufficiently appear from the judgment.

*Meade*, for the plaintiff.

*I. B. Stevenson*, for the defendant.

*Cur. adv. vult.* 25

HUTCHISON, J. Section 60 of the Counties Act, 1920, as amended by s. 2 (9) of the Local Elections and Polls Amendment Act, 1946, reads as follows:

The Council shall, on some day in March preceding every general election, hold a meeting for the purpose of considering the representation of the different ridings, and shall, if necessary, adjust the same so that the representation of the 30

several ridings shall, as far as possible, be proportioned to the rateable value and number of electors in each riding respectively.

- The relators are members of the North East Harbour Ratepayers and Householders Association. On February 15, 1950, a general election being due to be held in November, 1950, the solicitors for that Association and another Association wrote to the Council drawing attention to s. 60 and submitting on the figures that it was clear that an adjustment of representation was necessary. On March 23, 1950, the Council held such a meeting as is contemplated by s. 60, and the minutes of that meeting record:

After due consideration of Ridings Representation Cr. Rutherford moved and Cr. Jensen seconded that the Ridings Representation be as follows:

	Otago Heads Riding	.. ..	One Councillor
	Sandymount Riding	.. ..	One Councillor
15	Highcliff Riding	.. ..	One Councillor
	Tomahawk Riding	.. ..	One Councillor
	North East Harbour Riding	.. ..	Two Councillors
	Broad Bay Riding	.. ..	Two Councillors
	Portobello Riding	.. ..	One Councillor.

- 20 Cr. Rutherford moved and Cr. Jensen seconded that further consideration be given to dividing the North East Harbour Riding to North East Harbour and Waverley Ridings, Representation: North East Harbour Riding One Councillor and Waverley Riding One Councillor.

- These resolutions were carried without dissent. The first motion 25 left the representation as it was before, and any alteration subsequently made under the second motion would not increase the representation of the present North East Harbour Riding.

- The Court was informed that the difficulty between the parties has its source in the fact that the North East Harbour Riding and the Broad 30 Bay Riding are substantially urban and have recently had considerable increase both in the number of electors and in rateable value, and that there is some difficulty in attuning the interests of the urban and farming portions of the County. The difficulty is one that, no doubt, arises in other counties also that adjoin cities.

- 35 On September 7, 1950, the papers were filed in this matter, and the argument was heard on October 20. The County election was then due to be held on November 18. On the argument, it seemed to me that, as any adjustment of representation by an increase in the number of Councillors to be elected by any riding or by an alteration to riding 40 boundaries would, under ss. 59 and 23, respectively, of the Counties Act, 1920, in either case require a special order involving at least twenty-eight days between the two necessary meetings, no writ could have any practical effect in respect of the then forthcoming election, particularly having regard to the fact that, if a writ were issued, it would still require 45 consideration by the Council as to how the adjustment should be made, and, consequently, that it was undesirable that any judgment should be delivered before the election. I mentioned this point to counsel, asking whether they thought that an oral judgment would be of any assistance. In the course of a short discussion, the possibility of making some use 50 of s. 216 was mentioned, and counsel for the defendant said that the greatest assistance from the Council would be forthcoming in the event of the issue of a writ; but I understood counsel, after the discussion, to be of the view that I expressed. I thereupon said that I would reserve my decision and not deliver it until after November 18.

- 55 It was argued for the plaintiff that s. 60 casts upon the Council a legal duty of a public nature that is purely ministerial, and that the word

"as far as possible" have application to the difficulty that presents itself because of the fact that a calculation on the basis of the number of electors alone would in many cases lead to a different result from one based on the rateable value of property alone. The words "if necessary," it was said, import some qualification of that, but only so as to allow of an objective view such as the Court might take, and merely mean "if there is a disproportion," and do not point to any discretion in the Council. It was further said that, even if there were a quasi-judicial discretion in the Council, the Council has refused to exercise such discretion, as shown from the fact, as it was said, that the disparity was obvious.

For the defendant, it was denied that the matter was purely one of mathematical calculation, and it was said that the whole tenor of the Act is to give the Council of a county the right of forming an opinion as to matters that ought, in the interests of the county, to be done. It was said that four factors would have to be taken into consideration by a Council in its consideration of the question of representation of electors—the rateable value and the number of electors, the boundaries of ridings, and, possibly, the number of personnel of the Council. Of the two latter factors, it was said that alteration of boundaries of ridings is the one that ought first to be considered, as the number of Councillors is limited by s. 58, and that, in this particular case, it was almost impossible to make any adjustment of the ridings by alteration of boundaries, as this would entail such an alteration as taking certain streets of Broad Bay and putting them into a purely farming riding. It is to be noted, however, that these two latter considerations, as was pointed out for the plaintiff, relate only to the machinery to be used to make any adjustment that may be found to be required on a consideration of the rateable value and number of electors. It was further submitted for the defendant that, in any event, mandamus would not lie, because, it was said, the action of the Council under s. 60 involved a quasi-judicial consideration of the facts, and because the discretion of the Court should be exercised against issuing such a writ, as it would not be effective, and because of the delay that took place in the issue of the proceedings between April 21, when the relators were advised of the Council's decision, and September 7, when the proceedings were commenced.

In my opinion, no writ should now issue in these proceedings. No practical result could have been achieved by issuing such a writ before the election on November 18, 1950. The duty of the County Council under s. 60 in relation to the next general election does not arise until the month of March preceding such general election, and it is not to be assumed that there will be any failure on the part of the Council to carry out then any duty that may rest on it. It would, in my view, therefore, be wrong to issue any writ now.

It would not, however, be helpful to the parties to leave the matter at that, and I think it proper to express my view on the substantial question argued.

The purpose of the provision made by s. 60 of the Counties Act, 1920, is, as it says:

so that the representation of the several ridings shall, as far as possible, be proportioned to the rateable value and number of electors in each riding respectively.

The section, in my view, calls for an adjustment, as far as possible, of representation triennially when any substantial disproportion manifests itself in the representation of the several ridings, having regard to rate-

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- able value and number of electors in each riding. The words "as far as possible" recognize that there will be cases where it is not possible to make any reasonably precise adjustment. This may arise from the difficulty of reconciling the two factors to which the representation is to be proportioned. It may be, too, that such matters as community of interest come into consideration here, but I think that I need not, and therefore do not, express any view on this point, because, in this case, the number of Councillors for the North East Harbour Riding could be increased even if it were impracticable to alter the boundaries of ridings, and it was not argued that adjustment was required in respect of any other riding than North East Harbour.

- On the figures submitted, the greatest numbers of electors of any riding other than the North East Harbour Riding per Councillor representing them are 331 in the Broad Bay Riding and 296 in the Tomahawk Riding; the greatest rateable values in any riding other than the North East Harbour Riding per Councillor representing the riding are £85,075 in the Portobello Riding and £80,410 in the Highcliff Riding. The North East Harbour Riding has 1,034 electors and a rateable value of £299,005. By either measure mentioned in the section, its representation by two Councillors appears to be inadequate and to call for adjustment. The two possibilities of adjustment are by way of alteration of riding boundaries and by way of increase in the number of Councillors. How an adjustment should be made is a matter for the decision of the Council.
- In the circumstances, the motion will be dismissed, but the parties will pay their own costs.

*Motion dismissed.*

Solicitors for the plaintiff: *Ross, Meade, and Dowling* (Dunedin).

Solicitors for the defendant: *Solomon, Gascoigne, Solomon, and Sinclair* (Dunedin).

## BUSES, LIMITED v. LAURENSEN AND OTHERS.

SUPREME COURT. Hamilton. 1950. December 1, 7. STANTON, J.

*Transport—Passenger-service Licence—Increase or Reduction of Fares—Jurisdiction—Increase of Fares granted Licensee by Charges Appeal Authority after Refusal by Transport Charges Committee—Application for Review made by Commissioner of Transport to Committee One Month after Such Appeal allowed—No Material Change of Circumstances—Committee, on Such Application, reducing Fares—Matter not Res judicata—Review of Charges, however fixed, contemplated by Statute—Transport Act, 1949, ss. 122, 125, 169.*

The principle of *res judicata* does not apply to applications under the Transport Act, 1949, as the decisions of the tribunals under that statute do not, like ordinary judgments, determine the rights of the parties once and for all: they are open to review or reconsideration at the proper time and in the appropriate circumstances. No limitation is expressly imposed as to the time of making applications.



The plaintiff, the holder of a number of passenger-service licences, had lodged an application for an increase of fares, which was declined on March 9, 1950, by a Transport Charges Committee, and an appeal to the Charges Appeal Authority was allowed on August 3, 1950, and permission given for increases in fares. On September 15, 1950, the Commissioner of Transport applied to the Charges Appeal Committee to review and alter certain of the fares and charges as fixed by the Authority. The plaintiff applied for an order prohibiting and restraining the Commissioner and the Committee from proceeding on the Commissioner's application, and for a writ of certiorari. After those proceedings were commenced, the Committee gave its decision in respect of certain of the fares and charges mentioned in the application, and these were ordered to be reduced. The plaintiff appealed to the Authority.

On the motions for prohibition and certiorari,

*Held*, dismissing the motions, That the Committee, in proceeding to hear the Commissioner's application, had not acted without jurisdiction, as s. 122 of the Transport Act, 1949, contemplated reviews from time to time of charges, however fixed, including the review of charges fixed by the Charges Appeal Authority.

*Semble*, If a Committee reviews a decision of the Appeal Authority, its decision does not become effective, if an appeal is lodged, until the Appeal Authority has dealt with the appeal, so that actually the decision of that Authority cannot be altered without its own concurrence.

ACTION claiming issue of writs of prohibition and certiorari.

The plaintiff company was the holder of a number of passenger-service licences under the Transport Act, 1949. It lodged an application for an increase of fares shortly before the Act of 1949 came into force, and, by virtue of s. 169 of the Act, the application was continued under the provisions of the 1949 Act. This application was heard by a Transport Charges Committee at Hamilton, and on March 9, 1950, the Committee declined the application. The plaintiff appealed to the Charges Appeal Authority, and on August 3, 1950, this Authority allowed the appeal and gave to the plaintiff permission to increase its fares as set out in a series of schedules attached to the decision. 5 10

On September 15, 1950, the Commissioner of Transport made an application to the Charges Appeal Committee to review and alter certain of the fares and charges of the plaintiff as fixed by the Charges Appeal Authority. The plaintiff appeared before the Committee and contended that it had no jurisdiction to hear the application, but the Committee overruled this objection and proceeded to hear and determine the Commissioner's application. The plaintiff refused to take any part in this hearing, and took the present proceedings to obtain an order prohibiting and restraining the Commissioner and the Committee from proceeding on the above-mentioned application and for a writ of certiorari removing the proceedings into this Court. The Committee had, since the commencement of these proceedings, given its decision in respect of certain of the fares and charges mentioned in the application, and these were ordered to be reduced. From this decision the plaintiff had appealed to the Charges Appeal Authority. 15 20 25

It was alleged by the plaintiff and admitted by the defendants that there had been no material change in circumstances during the period between the decision of the Charges Appeal Authority and the lodging of the Commissioner's application. 30

*Haigh and A. K. Turner*, for the plaintiff.  
*Rosen*, for the defendants.

*Cur. adv. vult.*

STANTON, J. The plaintiff admits that he cannot succeed unless it is shown that the Committee, in proceeding to hear the Commissioner's application, acted without jurisdiction, but he contends that there was such an absence of jurisdiction, either on the ground of *res judicata* or by a construction of the Act, as would prohibit the Committee from so proceeding.

I do not think the principle of *res judicata* applies to applications under the Transport Act. It is evident that decisions of the tribunals under that Act are not intended to be final and to remain in force for all time. They do not, like ordinary judgments, determine the rights of the parties once and for all, and they are, and must be, open to review or reconsideration at the proper time and in the appropriate circumstances.

The question, therefore, is: What does the Act prescribe as to such times and circumstances? Section 122 provides that the functions of the Charges Appeal Committee are to fix, review, or alter the charges for the carriage of goods or passengers "whether the charges to be reviewed or altered have been fixed before or after the commencement of this Act." This section obviously contemplates reviews from time to time of charges, however fixed, and I think includes charges fixed by the Appeal Authority. Section 125 prescribes the procedure for hearing applications made to the Charges Appeal Committee, and s. 145 gives a right of appeal from every decision of the Committee to the Charges Appeal Authority.

Nowhere in the Act is any limitation expressly imposed as to the time of making applications, and I cannot see any ground for importing into it some implied limitation, either on the ground of shortness of time between a decision and a fresh application to review or because there has not been any change in circumstances. It is said that this construction will allow the Committee to sit immediately in judgment on the decisions of the Appeal Authority, and an applicant will be put to needless and endless expense and vexation in meeting successive applications. It should, however, be noted that, if a Committee does attempt so to act, its decision does not become effective, if an appeal is lodged, until the Appeal Authority has dealt with the appeal, so that actually the decision of that Authority cannot be altered without its own concurrence. I agree that successive applications may be vexatious, especially when admittedly there has been no change in circumstances, but I think that is a matter which, if it is to be remedied, must be achieved by an amendment of the Act. This conclusion is strengthened by the fact that, in an Act of 1933, there was an express limitation, but this provision was repealed in 1936, and neither in the repealing Act nor in any subsequent Act has any substituted provision been inserted.

I hold, therefore, that the plaintiff has not established its right to the issue of an order prohibiting or restraining the Commissioner or the Committee, and the action must be dismissed with costs as on a claim for £300 with disbursements to be fixed, if necessary, by the Registrar.

*Action dismissed.*

Solicitors for the plaintiff: *King, McCaw, and Smith* (Hamilton).  
Solicitor for the defendants: *Crown Solicitor* (Hamilton).

# NEW ZEALAND BREWERIES, LIMITED v. AUCKLAND CITY CORPORATION.

SUPREME COURT. Auckland. 1950. July 17; December 20. FINLAY, J.

*Rates and Rating—Water Rates—Ordinary Supply of Water—Hotel Premises within Meaning of "dwellinghouse"—Municipal Corporations Act, 1933, s. 82.*

The word "dwellinghouse," as used in s. 82 of the Municipal Corporations Act, 1933, means, in relation to the ordinary supply of water, a place in which people live, and in which, in consequence, they require water for the normal purposes for which water is required in the ordinary course of living.

Consequently, hotel premises in which a manager and his wife are required to reside, and which provide board and lodging for a limited number of the travelling public and a home for two staff members, constitute a "dwelling-house" for the purposes of s. 82 of the Municipal Corporations Act, 1933.

*West Middlesex Waterworks Co. v. Coleman* (1885) 14 Q.B.D. 529 referred to.

ORIGINATING SUMMONS for determination of the question whether the Naval and Family Hotel at Auckland was a "dwellinghouse" or whether it was a building other than a dwellinghouse for the purposes of s. 82 of the Municipal Corporations Act, 1933.

The hotel was held under lease by the plaintiff company, which, in the words of the contract of employment, employed a man and his wife to "reside in and well and faithfully conduct and manage" it. The hotel was designed to provide, and in fact did provide, board and lodging for a limited number of members of the travelling public. Permanent boarders could be, but were not, accepted.

According to the affidavit filed by the plaintiff, the hotel contained eleven bedrooms in all, of which five single bedrooms and one double bedroom were available for occupation by guests. Of the bedrooms not available to the public, one was presumably occupied by the manager and his wife, whilst two were occupied by two members of the staff. These latter were paid 15s. per week less than they would receive as wages if they lived elsewhere. It was said by the plaintiff that more than 90 per cent. of the total revenue from the hotel came from the sale of intoxicating liquors.

An affidavit made by the City Valuer and filed on behalf of the defendant established that the building consisted of a basement, a ground floor, and two upper floors. The basement and ground floor were fitted and used for the storage and sale of intoxicating liquors, and contained

MUNICIPAL CORPORATIONS ACT, 1933, Section 82 (1). Subject to the provisions of sections eighty-four and eighty-five hereof, in every borough giving a water-supply the Council may make and levy water rates in accordance with this section.

(2) Such rates may be made and levied in respect of—

(a) The ordinary supply within the meaning of any by-law defining the same; (b) The extraordinary supply within the meaning of any by-law defining the same; and

(c) Water-meters provided by the Council for measuring the quantity of water supplied.

(3) Water rates in respect of the ordinary supply shall be based on the annual value, as appearing on the valuation roll, of the property in respect of which those rates are levied.

(4) In respect of the ordinary supply to lands and dwellinghouses to which water is supplied the rate shall be either a uniform rate or a graduated rate, as the Council may from time to time determine.

(7) In respect of the ordinary supply to buildings (other than dwellinghouses) to which water is supplied the rates shall not exceed one-half of the rates specified in subsection five or subsection six hereof as the case may be.

conveniences available for the use of the public. The two upper floors were fitted and furnished for use as residential quarters. The first floor comprised kitchen, bathroom, and conveniences, dining-room, sitting-room, staff room, two bedrooms, and another room which could be used as a bedroom. The second floor comprised a sitting-room, bathroom and conveniences, and nine bedrooms.

The average daily consumption of water in the hotel could reasonably be taken as being 2,184 gallons. Eighty per cent. of this, the plaintiff estimated, was used in the bars, the cellars, and the bar lavatories. The exact quantity or proportion so used was not determinable, as there were no separate water meters for the bars.

The argument is sufficiently indicated in the judgment.

A. L. Martin, for the plaintiff.

H. J. Butler, for the defendant.

*Cur. adv. vult.*

FINLAY, J. [After stating the facts, as above:] The defendant Corporation, for the purpose of making and levying water rates, has passed by-laws defining "ordinary supply" and "extraordinary supply." The ordinary supply is defined by the by-laws as follows:

Any water supplied from the waterworks to property situated within the City and used for any of the following strictly domestic purposes shall be deemed to be ordinary supply—that is to say, water for the use of the consumer and his family and other inmates of his dwelling or premises for the time being, for drinking, for ordinary personal ablution, for cooking, for washing linen or clothes, for washing or cleaning floors, domestic or other furniture, or utensils or any part of the interior of the consumer's dwellinghouse or premises, and for water-closets, baths and urinals except as in s. 31 hereunder.

The by-law defines "extraordinary supply," so far as is possibly relevant, as follows:

Any water supplied from the waterworks and used for purposes other than ordinary supplies as herein defined and water used in or for any of the following purposes shall be deemed to be an extraordinary supply:

Water-closets, baths, and urinals in hotels and lodging-houses having accommodation for five or more lodgers.

Trade purposes of any kind whatsoever.

Laundries carried on as, or in connection with, a business.

Bottle-washing.

Bars of licensed hotels and clubs.

Cleaning windows or fronts of shops and business premises by means of a hose.

Restaurants and refreshment rooms.

The water rate in respect of ordinary supply is a uniform rate computed in accordance with subs. 5 of s. 82 of the Act. The rate in respect of extraordinary supply is (with certain exceptions where a flat rate is charged irrespective of the quantity of water consumed) calculated quarterly on the basis of the quantity of water actually supplied as measured by meter, with a minimum charge of one-quarter of the amount of water rate that would be payable as for ordinary supply in respect of the property supplied.

All water supplied to licensed hotels in the City of Auckland, including the Naval and Family Hotel, is measured by meter as for extraordinary supply, and is charged for according to the amount of water actually supplied. Where, however, the water supplied does not exceed in value the amount of the rate that would have been levied on the property as for ordinary supply, this rate is charged as a minimum. For the purposes of determining that minimum rate, licensed hotels in the City have always

been regarded and treated by the defendant Corporation as dwelling-houses coming within the ambit of subs. 4 of s. 82.

So far as is known, the Naval and Family Hotel has never consumed sufficient water to justify charges upon the footing of extraordinary supply in excess of what would be payable by way of the rate calculated on the basis of an ordinary supply to a dwellinghouse.

In assessing the annual value of the hotel under the Rating Act, 1925, and, therefore, for rating purposes generally, the defendant Corporation takes into account the enhancement in value attributable to the existence of the publican's licence associated with the premises, and so values them as premises to which a goodwill in respect of the business conducted therein attaches. It is said, therefore, that the defendant Corporation in effect treats the premises as business premises in assessing the annual value for rating purposes generally, but as a dwellinghouse for the purpose of assessing water rates.

What is involved is the neat question as to what is meant by the word "dwellinghouse" in subs. 7 of s. 82, for the rate in respect of ordinary supply to buildings other than dwellinghouses is not to exceed, as the case may be, one-half of the rates specified in subs. 5 or subs. 6.

In broad outline, it was contended for the plaintiff that the word "dwellinghouse" is inapplicable to an hotel, and is particularly inapplicable to an hotel such as the one now in question. Reference was made by counsel for the plaintiff to *In re Norris, Ex parte Reynolds* ((1888) 5 Morr. 111), *In re Erskine, Ex parte Erskine* ((1893) 10 T.L.R. 32), *Macdougall v. Paterson* ((1851) 11 C.B. 755; 138 E.R. 672), which was a case on procedure, *Marsh v. Conquest* ((1864) 17 C.B. (N.S.) 418, 432; 144 E.R. 169, 174), which was under the same Act as *Macdougall v. Paterson* ((1851) 11 C.B. 755; 138 E.R. 672), and *Brown v. Ocean Accident and Guarantee Corporation, Ltd.* ([1916] N.Z.L.R. 377). Reference was also made by Mr. Martin to *Wood v. Barber* ([1946] N.Z.L.R. 323), to *In re Marshall and Scott's Contract* ([1938] V.L.R. 98), and to two American cases, *De Wolf v. Ford* ((1908) 127 Am. St. Rep. 969, 973) and *Thomas v. Commercial Union* ((1894) 44 Am. St. Rep. 323).

Counsel also mentioned s. 59 (5) of the Statutes Amendment Act, 1939, with respect to the prohibition of intoxicating liquor at dances, where a distinction is drawn in the phrase "in any licensed premises" or "in any dwellinghouse." Reference was also made to *South Suburban Gas Co. v. Metropolitan Water Board* ([1909] 2 Ch. 666), but only for the purpose of demonstrating that water-rating cases in England are distinguishable, in that what is referred to there is not the character of the building, but is the use made of the water. Counsel referred to *Macmillan and Co., Ltd. v. Rees* ([1946] 1 All E.R. 675) as more apposite. It was there held that the term "dwellinghouse" imports more than sleeping and taking meals on premises. Then, finally, it was contended for the plaintiff that, if there be ambiguity as to liability, then that liability should be resolved against the Corporation.

Mr. Butler, for the Corporation, contended that ss. 82-86 of the Act form a code complete in itself for the purposes of making and levying water rates, and it was therefore necessary to examine the relevant sections each with the other, because the meaning of the term "dwellinghouse" must be determined in the light of the context and the subject-matter: *Maxwell on the Interpretation of Statutes*, 9th Ed. 63. He divided his argument into three parts. In the first part, he examined the sections; in the second part, he showed how the code operates in the City of Auckland; and then, finally, he referred to cases more relevant,

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as he said, to the subject-matter than many of those quoted by Mr. Martin.

In the result, he submitted that the Naval and Family Hotel was a dwellinghouse within the meaning of subs. 7 of s. 82. After examining ss. 82-84 (inclusive), Mr. Butler made two observations as to s. 82.

The first was that, when dealing with ordinary supply to dwelling-houses, payment is made, not in accordance with the quantity of water received, but in accordance with the value of the premises.

His second observation was that the amount of the water rate is not wholly divorced from the amount of water consumed, or likely to be consumed, in view of the fact that relief is provided in three cases—namely, (a) where there is no consumption, (b) where a dwelling or building is unoccupied for six months, and (c) because a distinction is made between ordinary supply to dwellings and ordinary supply to buildings other than dwellings.

It follows, therefore, it was said, that, in considering the meaning of the term “dwellinghouse” in its context, it is pertinent to ask why the distinction was made. The answer suggested was that it was that a greater consumption could be expected in premises in which people reside than that to be expected in premises where no one is living. From this, he contended that the term “dwellinghouse” means a place where people dwell or live, and that there is no justification for an interpretation which would confine its meaning to “a private dwelling.” Had the Legislature intended so to confine the meaning, it would, Mr. Butler contended, have said so.

Then, too, reference was made to s. 306 of the Act, as showing that, when the Legislature intended to exclude hotels, it said so expressly. From this, Mr. Butler argued that, as s. 82 contains no exception of licensed premises, such premises are comprehended in the term “dwellinghouse.” Incidentally, he mentioned that s. 2 of the Tenancy Act, 1948, expressly excludes licensed premises from the term “dwelling-house.”

In the third phase of his argument, Mr. Butler referred to *Vaile and Sons, Ltd. v. Mayor, &c., of Auckland* ([1931] N.Z.L.R. 769), where the Court adopted the test enunciated by the House of Lords in *Lewin v. End* ([1906] A.C. 299). He then referred to the Rent Restrictions Act in England, and various authorities under it, which can be listed as follows: *Epsom Grand Stand Association Ltd. v. Clarke* (1919) 35 T.L.R. 525), where the Court of Appeal held that a licensed hotel was a dwellinghouse within the meaning of the Rent Restrictions Act in England, *Burns v. Radcliffe* ([1923] 2 I.R. 158), in which, following the *Epsom Grand Stand Association* case (1919) 35 T.L.R. 525), a private hotel was held to be a dwellinghouse, and *Vickery v. Martin* ([1944] 2 All E.R. 167), in which the Court of Appeal in England held a house in which boarders were kept to be a dwellinghouse.

Under the London Building Act, 1894, he mentioned *London County Council v. Davis* (1897) 77 L.T. 693). Under other Acts, he referred to *Re Ross and Leicester Corporation* (1932) 96 J.P. 459), where a common lodging-house was held to be a dwellinghouse, to *Rolls v. Miller* (1884) 53 L.J. Ch. 682), and to numerous cases under the Waterworks Clauses Acts in England.

In the result, he submitted that the test of whether or not a place is a dwellinghouse is that enunciated by Lord Atkinson in *Lewin v. End* ([1906] A.C. 299, 304) and followed in *Vaile's* case ([1931] N.Z.L.R. 769, 776, 777). By that test, he again contended that a house in which

people actually live is a dwellinghouse. In the final result, therefore, it becomes a question of fact for determination in any given case whether the premises satisfy the test.

As to the character of the building now in question : He referred to the Licensing Act, 1908, which, by s. 265, requires that at least six bedrooms must be available for the use of guests.

The question being one of interpretation, it must, I apprehend, be determined in accordance with the principle affirmed by *Viscount Haldane, L.C.*, in *Inland Revenue Commissioners v. Herbert* ([1913] A.C. 326, 332). It was there said that the duty of a Court of law "is simply to take the statute it has to construe as it stands, and to construe its words according to their natural significance" (*ibid.*, 332).

In the same passage, the learned Lord Chancellor negatived the right of the Court to speculate as to the probable opinion and motives of those who framed the legislation, except in so far as those opinions and motives appear from the language of the statute. From this, it follows, as *Viscount Haldane* expressed it, that, if the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if the expressions were taken by themselves. But, subject to this, the words used must be given their natural meaning, unless to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated.

When what has to be determined is the meaning of a particular word in a particular statute, read in the light of its context, it is not very helpful to consider the meaning attributed to the same word when used in different contexts in different statutes, passed for different purposes. For this reason, it seems to me that many, if not all, of the cases to which I was referred by counsel are of little assistance in any direct sense.

In *In re Norris, Ex parte Reynolds* (1888) 5 Morr. 111, a debtor who was not domiciled, and had no dwellinghouse or place of business, in England had, for eighteen months previous to the presentation of the bankruptcy petition against him, occupied a room at an hotel in London. He paid for this room continuously during that time, and was treated as an ordinary resident there. It was held that the debtor had ordinarily resided in England during the period he occupied the hotel room. It was, of course, residence for the purposes of a particular statute, and it is difficult to appreciate its relevance to this case.

In *re Erskine, Ex parte Erskine* (1893) 10 T.L.R. 32 was another bankruptcy case in which a debtor had only a bedroom in a lodging-house in London in which he slept at intermittent times during the period limited by the statute. *Lord Esher, M.R.*, commented that his occupancy of the room was consistent with his being a mere visitor there, whereas the Act required that he should be ordinarily resident. It is difficult to see the relevance of this case either, in present circumstances.

*Marsh v. Conquest* (1864) 17 C.B. (N.S.) 418 ; 144 E.R. 169 seems to me to be similarly inapposite, for it distinguishes between a permanent place of residence and residence for a temporary purpose only. *Macdougall v. Paterson* (1851) 11 C.B. 755 ; 138 E.R. 672 is of much the same character. So far as it is pertinent at all, it is merely authority for the statement that, where a man has a permanent residence in one place and is lodging, for a temporary purpose only, at another, he does not "dwell" at the latter place within the meaning of a section of an Act dealing with County Courts.

*Brown v. Ocean Accident and Guarantee Corporation, Ltd.* ([1916] N.Z.L.R. 377) seems to have little more application. All that can be said of it is that it was there held that, for the purposes of a condition in an insurance policy, there was not a change in the nature of the occupation of a building merely because it was insured as a dwellinghouse when in fact some boarders were taken into it.

I leave any reference to *Wood v. Barber* ([1946] N.Z.L.R. 323) to a later point in this judgment, as it can more properly be dealt with there. Some of the cases quoted by Mr. Butler have some slight application, but before proceeding to consider them, I make the initial comment that all cases under the Waterworks Clauses Acts (Eng.) must be read subject to an understanding that the dominant question in all of them, as Mr. Martin pointed out, is the use to which the water is put, and not—or, at most, only incidentally—the nature of the premises to which the water is supplied. Then, too, the case of the type of *West Middlesex Waterworks Co. v. Coleman* ((1885) 14 Q.B.D. 529) is of no help, for the subject discussed in that case was how the annual value of the premises was to be assessed, having regard to the facts that the property was a licensed public house and that a premium had been paid for what (it was suggested) was goodwill.

Such cases as are of assistance are so somewhat indirectly, by illustrating with what elasticity the word “dwellinghouse” has been interpreted by the Courts in order to give effect to the purposes sought to be achieved by enactments dealing with widely different topics. For instance, in *Liskeard Union v. Liskeard Waterworks Co.* ((1881) 7 Q.B.D. 505), the point primarily in issue was the existence or otherwise of an obligation on the part of a waterworks company to supply a workhouse with water for domestic purposes, and it was held, incidentally, by Lord Coleridge, L.C.J., that a workhouse was a dwellinghouse for the purposes of a section of the Waterworks Clauses Act, 1847, with which the Court was concerned.

Similarly in *South-West Suburban Water Co. v. St. Marylebone Union* ([1904] 2 K.B. 174), where the occupiers of a school, although they were held to be carrying on a business, were held entitled to be supplied with water for domestic purposes, Buckley, J., in the course of his judgment (*ibid.*, 180) saying that the premises constituted a dwellinghouse because they were occupied by children and by those who governed and controlled them, and because all these persons were resident on the premises. In this respect, he relied upon *Liskeard Union v. Liskeard Waterworks Co.* ((1881) 7 Q.B.D. 505).

The same elasticity of interpretation to secure conformity with the purposes of legislation is to be found in *Lewin v. End* ([1906] A.C. 299). What was there in question was what was meant by the word “house” in two statutes (now old). The properties in question had originally been used as, and were still ostensibly, dwellinghouses, although altered and used exclusively for business purposes. Lord Loreburn, L.C., construed the word “house” as importing a place of residence, and, in the absence of any resident (other than possibly a mere caretaker), he held that, in deciding whether premises were a house or not, the structure and character of the building as a whole had to be regarded, in order to see whether it was fit, or could readily be fitted, for use as a residence by any class or condition of persons in the ordinary way of living. Lord James said that a man may carry on a business in a house as well as in a warehouse or office, and that, if there remains a structure which can be applied to the purposes to which an ordinary house is applied, then



the words in the section of the later of the two Acts were satisfied. *Lord Robertson* and *Lord Atkinson* concurred. It will be noted, however, that both *Lord James* and *Lord Robertson* paid some attention to the fact that what the Court was concerned with was the word "house," and not the word "dwellinghouse."

*Levin v. End* ([1906] A.C. 299) was referred to in the judgment of the Court of Appeal in *Vaile and Sons, Ltd. v. Mayor, &c., of Auckland* ([1931] N.Z.L.R. 769, 776, 777, 778, 779) in that phase of the judgment which followed a reference to the judgment of *Lord Halsbury, L.C.*, in *Grant v. Langston* ([1900] A.C. 383), in which the uncertainty which has developed in the meaning of the word "house" was made the subject of comment; and the consequent necessity is enforced of determining the sense, in any given case, in which the Legislature has used that word.

The same elasticity of interpretation is illustrated in the cases under the Increase of Rent and Mortgage Interest War Restriction Act, 1915, and other legislation of the kind. These cases, as quoted to me, began with *Epsom Grand Stand Association, Ltd. v. Clarke* ((1919) 35 T.L.R. 525). There, as described in the judgment of *Moore, L.J.*, in *Burns v. Radcliffe* ([1923] 2 I.R. 158), the whole of the upper part of a house was used as a dwelling by a publican and his family, whilst the lower part was used for the purposes of an ordinary public house. *Banks, L.J.*, described the premises as in the fullest sense a dwellinghouse, and none the less so because it was a public house ((1919) 35 T.L.R. 525, 526). *Atkin, L.J.*, too, thought the premises were occupied as a dwellinghouse (*ibid.*, 526).

*Burns v. Radcliffe* ([1923] 2 I.R. 158) was an even stronger case, for there premises were used as a temperance hotel, and, although the proprietress was living on the premises, she was carrying on throughout the greater part of them the business of a temperance hotel. In fact, in the judgment of *Andrews, L.J.*, she is described as occupying two rooms only (*ibid.*, 163). *Moore, L.J.*, held that, whilst the occupation of letting lodgings is a business within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, yet it was a business that the proprietress was carrying on in her dwellinghouse, for she lived in the house, superintended the letting of various rooms for long or short periods, and attended to the comfort of and services upon her guests (*ibid.*, 162). *Andrews, L.J.*, similarly held that, although the hotel trading necessarily constituted a business, nevertheless it was a business of such a nature that the premises in which it was conducted never lost the character of a dwellinghouse (*ibid.*, 163). A dwellinghouse, he said, 40 simply meant a house to dwell in (*ibid.*, 164).

The cases of this type are somewhat numerous, and some of them were dealt with by *Fair, J.*, in *Blakey v. Brennan* ([1944] N.Z.L.R. 929, 937). The case to which I was more particularly referred was, however, *Vickery v. Martin* ([1944] 2 All E.R. 167). This was an action under the Rent and Mortgage Interest Restrictions Act, 1939 (Eng.). There, the tenant, although subject to the covenant to use premises as a private dwellinghouse only, in fact used them as a boardinghouse. She reserved to her own use certain rooms, which she changed as circumstances required. The question before the Court of Appeal was whether the premises came under the Rent Restrictions Acts or were excluded from them as being business premises. It was held that, upon the true construction of the Act:

the test is not whether the dwellinghouse is substantially used for business purposes but whether in fact part of the premises are used as a residence.

- In the course of his judgment, *Lord Greene*, M.R., after referring (*ibid.*, 169) to the change in the statute law after the *Epsom Grand Stand* case ((1919) 35 T.L.R. 525) and to the comment of *Scrutton*, L.J., in *Hicks v. Snook* ((1928) 93 J.P. 55, 56) that the Act of 1920 merely affirmed in statutory form what the Court of Appeal had decided in the *Epsom Grand Stand* case ((1919) 35 T.L.R. 525), said: "The first question, therefore, in relation to any particular premises is: Are these premises a dwellinghouse within the meaning of the Act?" ([1944] 2 All E.R. 167, 170). He answered that question by saying that the house was, in his opinion, unquestionably a dwellinghouse in that it was a house in which the tenant lived and of which she had exclusive part use. It was her home. She had her husband to come and live there when he was available, and her children, and it was hers exclusively, subject to such licences as she might from time to time grant to persons who came as lodgers or guests to the house. He commented: "Subject to that, it is her home and it is her dwellinghouse, and the fact that she puts herself from time to time to a certain amount of inconvenience does not alter the fact that it is her home and her house, and there she lives" (*ibid.*, 170). *MacKinnon* and *Luxmoore*, L.J.J., agreed.
- There is nothing to the contrary of this in *Wood v. Barber* ([1946] N.Z.L.R. 323), in which *Blair*, J., held that a thirty-roomed building, used as a private hotel, was not let as a dwellinghouse within the meaning of s. 3 of the Fair Rents Amendment Act, 1942, but was let for exclusively business purposes as a boardinghouse.
- I regard all these cases as merely illustrative of how in particular instances the word "dwellinghouse" has been interpreted, and as indicating to some extent the existence of a settled judicial conception that a dwellinghouse is a place in which people live, or which is capable of occupancy as a living-place. The only limit judicially expressed upon the breadth of that conception is to be found in *Burns v. Radcliffe* ([1923] 2 I.R. 158), where *Moore*, L.J., said that he would not regard residence in premises as constituting premises a dwellinghouse if the business conducted on the premises were incompatible with residence, whilst *Andrews*, L.J., said that, where a business is conducted upon premises, it will not deprive those premises of their quality as a dwellinghouse if—but only if—the business is one which can reasonably be carried on in a dwellinghouse.

- I do not, however, regard any of the cases quoted as conclusively decisive in respect of the meaning of the word "dwellinghouse" in s. 82 of the Municipal Corporations Act, 1933. Before approaching a consideration of that section, however, I feel constrained to confess that I can find in it no policy relating the quantum of payment to the quantum of probable consumption, as Mr. *Buller* suggested. What the section does, and all it does, is (i) to confer authority upon municipalities to make and levy water rates, and (ii) to control within wide limits the exercise of that power. To attribute any more precise policy to the Legislature would be, it seems to me, to embark upon speculation, and speculation of a kind that has been the subject of frequent judicial condemnation.

- I feel constrained, in consequence, to ascertain what the Legislature meant by the word without help from any disclosed policy, except such as can be inferred from the facts that the section distinguishes between ordinary supply and extraordinary supply and that a uniform or graduated rate is prescribed as available for what may be defined by the by-law as "ordinary supply." The term "ordinary supply" necessarily conveys

a conception of supply for those purposes for which water is normally required in this country by its inhabitants in the ordinary course of living.

Viewed in this light, it is obvious that subs. 7, by distinguishing between the ordinary supply to dwellinghouses and the ordinary supply to buildings other than dwellinghouses, has set a line of demarcation the margins of which, having regard to the complexity of modern conditions, are decidedly uncertain. But this much is, I think, certain, that the supply was intended to be regarded as ordinary when supplied to places in which people live, and in which they in consequence require water for the normal purposes for which water is required in the ordinary course of living.

Judged by that standard, I cannot resist the conclusion that the hotel here in question is, in truth and in fact, a dwellinghouse. It is the home of the manager and his wife, it is the home of two members of his staff, and it is adapted and it may well in fact, however temporarily, be the place of residence of those other people who, whether as guests or not, occupy the available rooms on the two upper floors of the premises for residential purposes. All thus resident on the premises require water for precisely the same purposes for which water is required according to the ordinary habits of domestic life in this country in dwellinghouses; and only the definition of the hotel premises in question as a dwellinghouse would, it seems to me, be consonant with what the Legislature had in mind when, in subs. 7, it used that term in contradistinction to buildings other than dwellinghouses. There is some conformity, too, between my conclusion in this respect and the conclusions reached in precedent judicial authority.

That the existence of a trade upon the premises and the existence of a licence with respect to the premises increase the value of the premises is not, I think, pertinent to the question here presented. In that respect there is some analogy with *West Middlesex Waterworks Co. v. Coleman* (1885) 14 Q.B.D. 529, for the Legislature has used the annual value of the premises as a whole as one element in the measure of liability, just as was done under the statutory authority under which the *West Middlesex Waterworks* case was decided, and that measure remains constant in consequence.

I feel, therefore, constrained to answer the originating summons by saying that the Naval and Family Hotel at Auckland is a dwellinghouse for the purposes of s. 82 of the Municipal Corporations Act, 1933.

The defendant is allowed £21 costs, together with disbursements to be fixed by the Registrar, against the plaintiff.

*Question answered accordingly.*

Solicitors for the plaintiff: *Nicholson, Gribbin, Rogerson, and Nicholson* (Auckland).

Solicitor for the defendant: *City Solicitor* (Auckland).

BARTON GINGER AND COMPANY, LIMITED v.  
WELLINGTON HARBOUR BOARD.SUPREME COURT. Wellington. 1951. April 26; June 14.  
HUTCHISON, J.

*Negligence—Bailor and Bailee—Bailee for Reward—Goods stolen while in Bailee's Custody—Negligence—Onus on Bailee of Proof of Theft's not occurring in consequence of His Neglect to take Appropriate Care in relation to Article Stolen.*

A bailee for reward does not discharge himself of his duty by showing that goods were stolen while they were in his custody. He must show that the theft was not due to any failure on his part in the exercise of the care and diligence which a careful and vigilant man would exercise in the custody of his own chattel of the like character and in the like circumstances.

*Bullen v. Swan Electric Engraving Co.* ((1907) 23 T.L.R. 258) and *Brook's Wharf and Bull Wharf, Ltd. v. Goodman Brothers* ((1937) 1 K.B. 534; [1936] 3 All E.R. 696) followed.

*Goldman v. Hill* ([1919] 1 K.B. 443) referred to.

A fishing-rod was delivered into the custody of the Harbour Board packed in a small wooden case, consigned to the appellant. The appellant's lorry-driver obtained the case in a wharf shed, and placed it on the floor leaning against the front of a stack of goods. He was away looking for other goods for a quarter of an hour; and, when he returned, the case was missing, and was not recovered.

The appellant brought a claim against the Harbour Board for the value of the missing article, and the learned Magistrate entered judgment for the Harbour Board. On appeal from that determination,

*Held*, That, as the appellant's driver found the case and as he himself leant it against the front of the stack before it was stolen, it was not lost on account of any failure by the Harbour Board to store it in a suitable place.

2. That the Harbour Board had discharged the onus of showing that the theft took place notwithstanding that it had taken all reasonable precautions to guard against the danger.

APPEAL under s. 71 of the Magistrates' Courts Act, 1947.

The appellant, as plaintiff in the Court below, brought a claim in respect of two fishing-rods consigned to the appellant which, according to the allegations in the statement of claim, had been discharged from

- 5 overseas vessels into the custody of the respondent Board, and which the Board had failed to deliver to the appellant. When the case came on for hearing in the Magistrates' Court, the claim in respect of one of the fishing-rods was stood over; and the action proceeded as regards the second fishing-rod, which had been discharged from the *Dominion*  
10 *Monarch*. The claim was for £17 9s. 6d.

- The facts may be summarized as follows: A fishing-rod was discharged from the *Dominion Monarch* into the custody of the respondent Board on or about February 28, 1950. It was packed in a small wooden case, 4 ft. in length and 3 in. by 3 in. in breadth and depth. The  
15 appellant's lorry-driver, Easton, an experienced man, found the case, which he was expecting to find, at the back of a stack of miscellaneous goods in the respondent's Shed No. 37, and he placed it on the floor leaning against the front of the stack. He was away for about a quarter of an hour getting his lorry and looking for other goods, and, when he  
20 returned, the case was missing. There were a number of employees of the respondent Board attending to their respective duties in the shed

a conception of supply for those purposes for which water is normally required in this country by its inhabitants in the ordinary course of living.

Viewed in this light, it is obvious that subs. 7, by distinguishing between the ordinary supply to dwellinghouses and the ordinary supply to buildings other than dwellinghouses, has set a line of demarcation the margins of which, having regard to the complexity of modern conditions, are decidedly uncertain. But this much is, I think, certain, that the supply was intended to be regarded as ordinary when supplied to places in which people live, and in which they in consequence require water for the normal purposes for which water is required in the ordinary course of living.

Judged by that standard, I cannot resist the conclusion that the hotel here in question is, in truth and in fact, a dwellinghouse. It is the home of the manager and his wife, it is the home of two members of his staff, and it is adapted and it may well in fact, however temporarily, be the place of residence of those other people who, whether as guests or not, occupy the available rooms on the two upper floors of the premises for residential purposes. All thus resident on the premises require water for precisely the same purposes for which water is required according to the ordinary habits of domestic life in this country in dwellinghouses; and only the definition of the hotel premises in question as a dwellinghouse would, it seems to me, be consonant with what the Legislature had in mind when, in subs. 7, it used that term in contradistinction to buildings other than dwellinghouses. There is some conformity, too, between my conclusion in this respect and the conclusions reached in precedent judicial authority.

That the existence of a trade upon the premises and the existence of a licence with respect to the premises increase the value of the premises is not, I think, pertinent to the question here presented. In that respect there is some analogy with *West Middlesex Waterworks Co. v. Coleman* ((1885) 14 Q.B.D. 529), for the Legislature has used the annual value of the premises as a whole as one element in the measure of liability, just as was done under the statutory authority under which the *West Middlesex Waterworks* case was decided, and that measure remains constant in consequence.

I feel, therefore, constrained to answer the originating summons by saying that the Naval and Family Hotel at Auckland is a dwellinghouse for the purposes of s. 82 of the Municipal Corporations Act, 1933.

The defendant is allowed £21 costs, together with disbursements to be fixed by the Registrar, against the plaintiff.

*Question answered accordingly.*

Solicitors for the plaintiff: *Nicholson, Gribbin, Rogerson, and Nicholson* (Auckland).

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BARTON GINGER AND COMPANY, LIMITED v.  
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*Negligence—Bailor and Bailee—Bailee for Reward—Goods stolen while in Bailee's Custody—Negligence—Onus on Bailee of Proof of Theft's not occurring in consequence of His Neglect to take Appropriate Care in relation to Article Stolen.*

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*Bullen v. Swan Electric Engraving Co.* (1907) 23 T.L.R. 258 and *Brook's Wharf and Bull Wharf, Ltd. v. Goodman Brothers* ([1937] 1 K.B. 534; [1936] 3 All E.R. 690) followed.

*Coldman v. Hill* ([1919] 1 K.B. 443) referred to.

A fishing-rod was delivered into the custody of the Harbour Board packed in a small wooden case, consigned to the appellant. The appellant's lorry-driver obtained the case in a wharf shed, and placed it on the floor leaning against the front of a stack of goods. He was away looking for other goods for a quarter of an hour; and, when he returned, the case was missing, and was not recovered.

The appellant brought a claim against the Harbour Board for the value of the missing article, and the learned Magistrate entered judgment for the Harbour Board. On appeal from that determination,

*Held*, That, as the appellant's driver found the case and as he himself lent it against the front of the stack before it was stolen, it was not lost on account of any failure by the Harbour Board to store it in a suitable place.

2. That the Harbour Board had discharged the onus of showing that the theft took place notwithstanding that it had taken all reasonable precautions to guard against the danger.

APPEAL under s. 71 of the Magistrates' Courts Act, 1947.

The appellant, as plaintiff in the Court below, brought a claim in respect of two fishing-rods consigned to the appellant which, according to the allegations in the statement of claim, had been discharged from 5 overseas vessels into the custody of the respondent Board, and which the Board had failed to deliver to the appellant. When the case came on for hearing in the Magistrates' Court, the claim in respect of one of the fishing-rods was stood over; and the action proceeded as regards the second fishing-rod, which had been discharged from the *Dominion* 10 *Monarch*. The claim was for £17 9s. 6d.

The facts may be summarized as follows: A fishing-rod was discharged from the *Dominion Monarch* into the custody of the respondent Board on or about February 28, 1950. It was packed in a small wooden case, 4 ft. in length and 3 in. by 3 in. in breadth and depth. The 15 appellant's lorry-driver, Easton, an experienced man, found the case, which he was expecting to find, at the back of a stack of miscellaneous goods in the respondent's Shed No. 37, and he placed it on the floor leaning against the front of the stack. He was away for about a quarter of an hour getting his lorry and looking for other goods, and, when he 20 returned, the case was missing. There were a number of employees of the respondent Board attending to their respective duties in the shed

at the time. There were no casual labourers or waterside workers there at the time, but there were eight to ten drivers of other lorries. The case had not been seen since. Other evidence was referred to in the judgment.

The learned Magistrate in a reserved judgment held against the appellant, and entered judgment for the respondent with costs. He gave leave to appeal. 5

*Shorland*, for the appellant.

*J. F. B. Stevenson*, for the respondent.

*Cur. adv. vult.* 10

HUTCHISON, J. The appeal was lodged before the date of the coming into force of the Magistrates' Courts Amendment Act, 1950, but counsel were in agreement that the case should be heard on the Magistrate's notes of evidence. There is no conflict of evidence; the Magistrate speaks of the only material witness for the appellant (*Easton*) as being a good type of witness, and records his acceptance of the evidence of the witnesses for the respondent in these words: "In the circumstances, I can and do accept the evidence of the defendant at its face value, particularly as I was impressed with the integrity and sense of responsibility of the witnesses called by the defendants." 15 20

Mr. *Shorland* submitted that his appeal was on account of an error of law through the Magistrate's failing, as he submitted, to direct himself on the law to the fact that the duty of care in any particular case is dictated by the nature of the goods handled and the circumstances generally, and, in so doing, fixing a duty that is below the standard imposed by law for this particular case. The Magistrate in his judgment quoted from *1 Halsbury's Laws of England*, 2nd Ed. 748, para. 1232: 25

The standard of care and diligence . . . must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattels. 30

Mr. *Shorland* said that the omission from this quotation of the remaining words of the sentence ("of a similar description and character "in similar circumstances") supported his submission that the Magistrate did not give due weight to the nature of the missing case and the circumstances existing at the time. I do not think that the omission of these last words from the quotation points to the learned Magistrate's not placing any great importance upon them. On the contrary, I think that he omitted them as being so clearly matters that come into consideration that it was unnecessary for him to state them, his quotation being directed to the question of the degree of care that rests upon a bailee for reward as distinguished from a gratuitous bailee, and it being unnecessary in that context to quote words which apply to all cases where the standard of care is being considered. Counsel further submitted that, if the question were held to be, not one of law, but one of fact, nevertheless the Magistrate erred in the inference that he drew from undisputed facts, and, therefore, that this Court was free to reverse the Magistrate's decision on the facts, notwithstanding that the appeal did not take the form of a rehearing. I agree with this latter submission. I think that the question is almost entirely a question of fact, but that, in the circumstances, there being no conflict of evidence at all, and no question of credibility, this Court is in as good a position as was the learned Magistrate to draw the proper inference, and that it is open to this Court to reverse a decision come to on the facts if it 35 40 45 50

takes a different view of them from that taken by the Court below: *Earl of Halsbury, L.C.*, in *Montgomerie and Co., Ltd. v. Wallace-James* ([1904] A.C. 73, 75), *Pryce v. Small* ((1909) 28 N.Z.L.R. 590, 593), and *Billy Higgs and Sons, Ltd. v. Baddeley* ([1950] N.Z.L.R. 605, 615, 1. 43).

- 5 The inference drawn by the chief wharfinger and the shed foreman of the respondent Board, after making full inquiries into the disappearance of this case, was that it might well have been taken by one of the lorry-drivers other than the appellant's driver, Easton. There was no other explanation that they thought reasonable, nor could Easton suggest any other explanation, and it was accepted by the learned Magistrate in his judgment and by counsel in this Court that that was the explanation. If a lorry-driver took it, it is a necessary inference that he took it deliberately, with the intention of stealing it. He could hardly handle it without knowing that it was a case. Its appearance would show him that, and it would probably have a label on it. No lorry-driver has returned it, and a possible explanation is that the thief took it out of the shed using it as dunnage. In the shed, there was a quantity of dunnage which it was proper for lorry-drivers to use, if they wished, in the handling and packing on their lorries of the goods they were taking away. A case of the shape and size of that containing the fishing-rod would look like a piece of dunnage if it were on a lorry with a case on top. When a lorry-driver removes goods from the shed, his load is checked out by a delivery clerk or ticket-writer, who prepares and signs a docket setting out what the load consists of. It is again checked with the docket by a toll clerk at the wharf gate.

- Mr. *Shorland's* broad submission was that a bailee for reward (and it was common ground that the respondent Board was a bailee for reward) who holds a fishing-rod packed in a case that looks like dunnage, in a shed containing dunnage, which may be taken away more or less freely by drivers, is under a duty to exercise care that the rod is not taken out as dunnage. He submitted that the respondent Board had failed to exercise the proper care in this case (i) in not storing the case in some place such as the foreman's office, where it would not be mixed up with dunnage, or (ii) in not requiring the ticket-writers to check (when there was such a thing as a fishing-rod in the store) that apparent dunnage on a lorry was not, in fact, a fishing-rod in a case. The submission was that the respondent's system was at fault in these respects, it being agreed that its staff was a proper one and that the members of the staff performed their duties in a proper manner.

- I do not think that a failure in storing the case where it could not be mistaken for dunnage, assuming that there was a duty so to store it, was a matter which affects the position in this case. The appellant's driver found the case, and he himself leant it up against the front of the stack. If he had had first to get it from some place in which it had been specially kept, it would still, as far as the respondent Board is concerned, have been leaning up against the front of the stack at this particular time. It was not, in my view, lost on account of any failure by the respondent to store it in a suitable place.

- On the second ground of negligence contended for by the appellant, Mr. *Stevenson*, for the respondent, submitted that the thief did not necessarily take the case away as dunnage on his truck, but may very well have put it in the cab or under the seat, or may have concealed it somewhere until an opportunity came to take it away. He said that, where, as here, it was agreed that the respondent provided a proper shed and proper staff for the safe custody of goods and that such staff per-



formed their duties in a proper manner, and where the reasonable (and accepted) inference is that the case was stolen in the space of a quarter of an hour, there was no onus on the respondent to show how it was stolen.

The question of onus of proof is dealt with in this way in *1 Halsbury's Laws of England*, 2nd Ed. 751, para. 1234 :

When a chattel intrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. If he succeeds in showing this, he is not bound to show how or when the loss or damage occurred.

To absolve from liability a bailee for reward, it is not sufficient for him to show that the article was stolen ; he must show that the theft did not occur in consequence of his neglect to use the appropriate care and diligence in relation to the article. In all the theft cases cited—*Bullen v. Swan Electric Engraving Co.* ( (1907) 23 T.L.R. 258), *Brook's Wharf and Bull Wharf, Ltd. v. Goodman Brothers* ([1937] 1 K.B. 534 ; [1936] 3 All E.R. 696), and the unreported Western Australian case, decided in 1921, *Colonial Sugar Refining Co., Ltd. v. Freemantle Harbour Trust Commissioners*—the matter was dealt with on that basis. In *Bullen v. Swan Electric Engraving Co.* ( (1907) 23 T.L.R. 258), *Sir Gorell Barnes, P.*, said : "One of these [well-known principles of law] was that a "gratuitous bailee [as it was in that case] must show that the loss occurred "through no want of reasonable care on his part" (*ibid.*, 259). In *Brook's Wharf and Bull Wharf, Ltd. v. Goodman Brothers* ([1937] 1 K.B. 534 ; [1936] 3 All E.R. 696), *Lord Wright, M.R.*, said : "I think the "plaintiffs discharge the burden of proof upon them if they can show "that the theft took place notwithstanding that they had taken "all "reasonable precautions to guard against the danger" (*ibid.*, 539 ; 702). In *Colonial Sugar Refining Co., Ltd. v. Freemantle Harbour Trust Commissioners*, *Sir Robert McMillan, C.J.*, quoted (*inter alia*) the expression from the judgment of *Bankes, L.J.*, in *Coldman v. Hill* ([1919] 1 K.B. 443) : "the line of cases which from the earliest times have laid it down "that a bailee is not responsible if the goods in his custody are stolen "without any default on his part" (*ibid.*, 448).

When, then, a suggestion is made by the respondent's witnesses, as to the probable way in which the theft occurred, it seems to me that there still rests on the respondent the onus of showing that a theft in that way was not due to any failure on its part in the exercise of the care and diligence which a careful and vigilant man would exercise in the custody of his own chattel of the like character and in the like circumstances.

While, however, the respondent's system must be looked at in relation to the way in which the theft probably occurred, it must be remembered that, for the business of the port to be carried on, lorry-drivers have to bring their lorries into the shed, and that, if one of them were minded to steal a small case such as this, a direction to the delivery clerks to examine the apparent dunnage carefully would not cover all possibilities, and the direction would have to extend to one to examine every part of a lorry where such a thing might be concealed. The delivery clerks, in examining the goods on the lorry, would, without any specific direction to examine the dunnage, see the dunnage, or most of it. Was it necessary specifically to require them to examine it with care, to meet the case where there was a small article of this size and shape in the shed ? The test is stated by *Lord Wright, M.R.*, in *Brook's Wharf and Bull Wharf, Ltd. v. Goodman Brothers* ([1937] 1 K.B. 534 ;

- [1936] 3 All E.R. 696) : " If the plaintiffs [the bailees] show that they "took all reasonable and proper care of the goods, the mere fact that "they were, notwithstanding, stolen is not sufficient any longer to "make them liable for negligence. Their explanation is, then, that the "thieves must have shown ingenuity and daring against which reason-  
 5 "able precautions could not avail. Hence, I think the plaintiffs dis- "charge the burden of proof upon them if they can show that the theft "took place notwithstanding that they had taken all reasonable pre- "cautions to guard against the danger " (*ibid.*, 539 ; 702).
- 10 On the whole, I think that the precaution now asked of the defendant goes beyond what, at the time when the loss occurred, would have constituted reasonable precautions. It would be very bold and ingenious to endeavour to carry out a theft in the way suggested. The chief wharfinger's evidence (" I know of no other precaution that could  
 15 "be taken to better the present system ") was not, as applicable to the facts in this case, challenged by the appellant's only witness, who had not, in twenty years' experience on the wharf, heard of a loss in similar circumstances. On the whole, then, I come to the same conclusion as the learned Magistrate did.
- 20 It is unnecessary to deal with the argument as to whether or not the appellant's claim is restricted to £5 by virtue of the respondent's By-laws 253 and 253 (a).

The appeal is dismissed with costs £10 10s.

*Appeal dismissed.*

Solicitors for the appellant : *Chapman, Tripp, and Co.* (Wellington).

Solicitors for the respondent : *Izard, Weston, Stevenson, and Co.* (Wellington).

## H. GOULD AND COMPANY, LIMITED v. CAMERON.

SUPREME COURT. Timaru. 1950. November 1 ; December 21. NORTH-CROFT, J.

*Transport—Heavy Motor-vehicles—Offences—Use outside District of Borough of Vehicle with Excessive Air Pressure in Tyres—Mechanical Device used to ascertain Such Pressure—Evidence of Correct Use and Reliability thereof—Mens rea not in Issue—" District of any borough "—Heavy Motor-vehicle Regulations, 1950 (Serial No. 1950/26), Regs. 6, 18.*

In a prosecution charging the defendant with operating a heavy motor-vehicle when the air pressure in the pneumatic tyres fitted to the rear wheels exceeded 75 lb. per square inch, contrary to Regs. 6 and 18 of the Heavy Motor-vehicle Regulations, 1950, and in similar cases where, of necessity, a mechanical device must be used to ascertain the pressure within the tyres, it is sufficient to show that the instrument was used correctly and that from its nature and history the Court may reasonably rely upon it.

*Penny v. Nicholas* (1950) 2 All E.R. 89) applied.

In such a case, the operator of the heavy motor vehicle cannot be excused because he had no guilty intent.

*R. v. Ewart* (1905) 25 N.Z.L.R. 709) distinguished.

The words "the district of any borough" in Reg. 6 of the Heavy Motor-vehicle Regulations, 1950, do not refer to anything more than the area within the borough boundaries.

APPEAL from the conviction of the appellant company upon an information by the respondent that it:

on July 27, 1950, at Kingsdown in New Zealand did operate a heavy motor-vehicle registered number H20.461 when the air pressure in the pneumatic tyres fitted to the rear wheels exceeded 75 lb. per square inch contrary to Reg. 6 and Reg. 18 of the Heavy Motor-vehicle Regulations, 1950 (Serial No. 1950/26).

Upon this information, a conviction was entered in the Magistrates' Court at Timaru on September 28, 1950.

The facts sufficiently appear from the judgment.

*Petrie*, for the appellant.

*Campbell*, for the respondent.

*Cur. adv. vult.*

NORTHCROFT, J. Regulation 6 of the Heavy Motor-vehicle Regulations, 1950, upon which the prosecution was founded, is as follows:

No person shall operate any heavy motor-vehicle outside of the district of any borough where there is a population of six thousand or upwards (as described in subsections (1) and (2) of section 64 of the Transport Act, 1949) if the air pressure in any pneumatic tire fitted to the vehicle exceeds 75 lb. per square inch.

The respondent swore that at Kingsdown he stopped a truck owned by the appellant company. At that time, it weighed over 16 tons loaded. The vehicle had two rear axles, with two wheels on each end of these axles. He applied a pressure gauge to each tyre of these eight wheels and found that the pressures were as follows: On the right rear wheels, the pressures were 89, 83, 89, and 67 lb. per square inch, and on the left rear wheels 91, 92, 83, and 91 lb. per square inch.

This evidence was not challenged, but it was submitted for the appellant that the instrument by which the pressures were measured was not dependable. It was proved for the respondent that a number of these tyre-pressure gauges had been distributed by the Transport Department to its Inspectors. These had been tested in Wellington before issue, and this particular instrument was at that time found to be in error by only 1 lb. over a range of tests between 70 lb. and 100 lb. This known error was applied to all readings to arrive at a correct result. The testing of this instrument had been carried out on March 18, 1950. On August 31, 1950, this instrument had been tested again, and had been found to be entirely accurate as to pressures at 80, 90, and 100 lb., but still inaccurate as to 1 lb. with pressures of 70 lb. and 75 lb. The instrument against which those in the possession of the Inspectors had been tested was of the Bourdon type, and this again had been tested by the Department of Scientific and Industrial Research at the Dominion Physical Laboratory against a deadweight tester. This latter test had been carried out in December, 1949, when the Bourdon-type instrument had been found to be accurate on a range of from 30 lb. up to 120 lb. to the square inch. The criticism of the appellant was that, although the instrument used by the Inspector on the day of the alleged offence had been tested in March, it was not proved that it might not have developed

an error on the day in July when the offence was alleged to be committed. This criticism is negated in part, although not entirely, by the test carried out in August.

Another criticism of the instrument used was that, from its type and manner of use, inaccurate readings might be obtained. Having heard the Inspector describe the manner in which he took the readings, and having heard also his cross-examination upon this, I am satisfied that he took the readings carefully, using the instrument properly, and that the readings he obtained were satisfactory.

- It was shown that, of the type of instrument used by the Inspector, of which apparently there are a number of different makes in use in the motor trade, variations had been found between different instruments. That does not, I think, prejudice the reliability of the instrument used by the Inspector on this occasion. It does no more than show that some makes of instruments of that type may not be as reliable as others, or, perhaps, that some of those between which discrepancies were found may have suffered some injury putting them out of adjustment. Even then, the differences found did not exceed 4 lb. per square inch. Having regard to those comparisons among different instruments of this type, I am still disposed to think that the excess pressures complained of by the Transport Department in this case, ranging as they did from 8 lb. to 17 lb. per square inch, were not due to error in an inaccurate testing instrument.

- On the objection that the instrument had not been tested recently, and that, therefore, its degree of accuracy on the day in question was not known, it is interesting to note that a somewhat similar objection failed recently in *Penny v. Nicholas* ([1950] 2 All E.R. 89). That was an appeal from a conviction for driving a motor-car at a speed of more than 30 miles per hour. The conviction was based upon the evidence of a Police Constable who had followed the offending car over a measured distance, during which time the speedometer of the Police car showed a speed of 40 miles per hour. Tests of the speedometer had been carried out before and after the alleged offence. It was objected in that case that there was no proof that the stop-watch by which the speedometer on the Police car had been tested had itself been tested. This view was rejected. In a discussion of *Penny v. Nicholas* in 86 *Law Quarterly Review*, 441, it is observed:

This argument, if carried to its logical conclusion, might well lead to an impasse, because the means of testing the speedometer might in their turn have to be tested too and so on *ad infinitum*.

- In a case such as this, where, of necessity, a mechanical device must be used to ascertain the pressure within the tyres, it is sufficient, I think, to show that the instrument is used correctly, and that, from its nature and history, it may reasonably be relied upon by the Court. The history of this instrument and the description of its use satisfies me that the learned Magistrate was justified in accepting it, as I do, as a reliable test on this occasion.

- The defence in this case is one with which I have a good deal of sympathy, as apparently did the Magistrate, who did no more than record a conviction, without imposing a fine, and merely ordered the appellant to pay Court costs amounting to 10s. Evidence was tendered which showed, in the first place, that the pressure in tyres of a heavy vehicle of this sort tends to increase when the vehicle is in use. This evidence indicated that the increased pressure is caused by the heating of the air within the tyre. This heat, as I understand the evidence, is developed in part by climatic and in part by mechanical conditions. On a hot day, the

increase in pressure might be expected to be greater than it would be on a cold day. Mechanical conditions which tended to generate heat were said to be variable. The running of the vehicle over a hard surface increases tyre pressure more than when it is run over soft surfaces. Furthermore, the weight of the load and the flexibility of the tyre—i.e., the initial pressure within it—also tend to increase pressure by generating heat. In some cases, the use of certain types of brakes operating on a metal drum in proximity to the tyre also has this effect. The evidence seemed to indicate that there is inevitably some increase in pressure after running in excess of that recorded before the vehicle starts upon its journey. The evidence showed that variations in pressure could range from increases of 5 lb. up to as much as 17 lb. per square inch. In these circumstances, it might well be difficult for the operator of such a vehicle to control the pressure within the prescribed limits.

It was explained that all tyres for vehicles of this type have a minimum pressure laid down, at which they can be used with the greatest efficiency and with the least damage to the tyres. It was suggested that, if this minimum pressure be not maintained, damage to the tyres will result, and it might even be such as to cause a blowout. For this reason, it was argued that the transport operator must always start off his vehicles at this minimum, and, therefore, should not be held responsible if the increased pressure occurring in travelling should exceed that permitted by the Regulations. I was told that this minimum for these tyres is 75 lb. per square inch.

Indeed, the case for the appellant went further, and it was argued that, where these increases in pressure developed, there was no *mens rea*, as it was not possible for the operator to prevent the increase, or to know that the pressure had increased to a point beyond that forbidden by the Regulations. I am unable to accept the view that there is any question of *mens rea* here at all such as was considered by the Court of Appeal in *R. v. Ewart* (1905) 25 N.Z.L.R. 709, to which I was referred. It was made clear as this case proceeded that there are available portable and easily-used gauges for testing the pressure of tyres. Operators and their drivers can inform themselves of the pressure of the tyres when they start on a journey, and, having regard to the factors known to increase the pressure, when it is judged the pressure may have increased, then tests can be made again and corrective action taken. I am unable to hold, therefore, that this is a case in which the operator should be excused because he had no guilty intent. If he did not know, he or his driver, from his knowledge and experience, ought to have suspected that the pressure had increased beyond the permitted limit, and there were available means of learning whether it had in fact done so.

This argument upon *mens rea* has, as it seems to me, more reference to the reasonableness of the Regulations. The task of a transport operator is certainly made burdensome if he is required to have his drivers test the tyres from time to time upon a journey and then to make adjustments by releasing pressure when it is beyond the permitted limit. This might well make the operation of such vehicles difficult. As this consideration really went to reasonableness, I was referred by counsel for the respondent to s. 167 of the Transport Act, 1949, subs. 6 of which states:

No regulation made under this Act shall be deemed invalid on the ground that . . . any conditions therein are unreasonably restrictive.

I think this section would prevent me, even if I were disposed to do so, from holding that the Regulation imposes an unreasonable restriction upon transport operators.

Another submission was made for the appellant with reference to the locality of the offence. Kingsdown was proved to be just one mile outside the boundaries of the City of Timaru. It was argued that this vehicle was, at the time complained of, within the "district" of Timaru, in that the metropolitan area of Timaru is not conterminous with its city boundaries, and might fairly be regarded as extending for more than one mile beyond them. The use of the words "outside of the district of any borough" was pointed to as indicating that something more than the bare limits of such a borough was intended. It was argued, therefore, that Kingsdown was so close to the city as to be reasonably regarded as being within the "district." This submission has force, in that the use of the word "district" does seem to suggest that something other than the bare boundaries of a borough is intended. If the intention were to create an offence the moment such a vehicle crossed the boundary of any borough, it is difficult to see why the Regulation did not say simply "outside of any borough," or, at any rate, "outside the boundaries of any borough." The use of the word "district" does create a difficulty. Unfortunately for the submission of the appellant, there is not, as far as I can see, any guide to the limitation to be given to the words "district of any borough." One may not speculate, in the absence of any positive indication of the limit intended. If it be not an offence one mile beyond the boundaries of a borough, it is not easy to say at what point, or by what system of assessment, the distance beyond the borough boundary is to be taken. The only guide to which I was referred was s. 54 (8) of the Transport Act, 1949, which makes a licence issued by a borough under its by-laws effective for five miles beyond the boundaries of that borough. I am not prepared to adopt this as a definition of "the district of any borough." Although I think the language used is confusing, I can find no justification for reading it as referring to anything more than the area within the borough boundaries.

I think the conviction appealed from was properly entered and must be sustained. The appeal, therefore, is dismissed. The respondent is allowed his costs, which I fix at ten guineas. As this appeal was by way of rehearing, the respondent is entitled to his witnesses' expenses as may be settled by the Registrar.

*Appeal dismissed.*

Solicitors for the appellant: *Joynt, Walker, and Petrie* (Timaru).  
Solicitors for the respondent: *Campbell and Kelly* (Timaru).

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# WELLINGTON MUNICIPAL OFFICERS' ASSOCIATION (INCORPORATED) v. WELLINGTON CITY CORPORATION AND ANOTHER.

SUPREME COURT. Wellington. 1951. June 18; July 10. GRESSON, J.

*Industrial Conciliation and Arbitration—Jurisdiction—Award—Interpretation—Supreme Court asked to make Declaratory Order, in effect to interpret Award—Making of Such Order by Supreme Court Undesirable and Inexpedient—Originating Summons dismissed—Industrial Conciliation and Arbitration Act, 1925, s. 75—Industrial Conciliation and Arbitration Amendment Act, 1947, s. 9 (1)—Labour Disputes Investigation Act, 1913, ss. 3, 8—Declaratory Judgments Act, 1948, ss. 2, 10.*

An agreement, dated December 3, 1950, and made pursuant to s. 8 of the Labour Disputes Investigation Act, 1913, was made and approved by the Court of Arbitration for the purposes of the Economic Stabilization Regulations, 1950, and was filed with the Clerk of Awards on December 22, 1950. It was expressed to bind:

"all members of the Association who are male officers in receipt of a salary exceeding £489 15s. 3d. per annum apart from overtime and also all members of the Association who are female officers in receipt of a salary exceeding £271 per annum apart from overtime; provided in all cases that these officers are not specifically bound by an industrial award or industrial agreement governing the class of work which they carry out for the Corporation."

On October 30, 1950, the Court of Arbitration made an Award which, so far as the provisions relating to the rates of wages to be paid were concerned, was to be deemed to have come into force on April 1, 1950, and, so far as all other provisions of the Award were concerned, was to come into force on the day of its date. It was expressed to apply to officers of the Council (with certain exceptions not material to these proceedings), and it excepted as well "male officers in receipt of a salary of more than £650 per annum apart from overtime" and female officers in receipt of a salary of more than £400 per annum apart "from overtime."

On originating summons under the Declaratory Judgments Act, 1908, the first question asked was "Does the agreement made on December 3, 1950, pursuant to the provisions of the Labour Disputes Investigation Act, 1913, govern the conditions of employment of the members of the plaintiff Association who were employed by the first defendant on that date?" or, in other words, whether those members of the Association who were members when the agreement of December 3, 1950, was entered into were bound as to conditions of employment by the terms of that agreement, or whether their conditions of employment were those prescribed by the Award.

*Held*, That, as the Court of Arbitration is the proper tribunal for the interpretation of awards, the Supreme Court should not determine the questions submitted to it by the originating summons, since to do so would be an interpretation, in a somewhat oblique fashion, of an award made by the Court of Arbitration; and, therefore, it was undesirable and inexpedient for the Supreme Court to make such a declaratory order to determine, in effect, who were or who were not within the scope of an award made by the Court of Arbitration, a matter peculiarly within the scope of that Court.

*Quaere*, Whether the plaintiff Association was a "person" entitled to bring an application under s. 3 of the Declaratory Judgments Act, 1908.

*New Zealand Educational Institute v. Wellington Education Board* ([1926] N.Z.L.R. 615) referred to.

**ORIGINATING SUMMONS** under the Declaratory Judgments Act, 1908. The first question asked by the originating summons was:

Does the agreement made on December 3, 1950, pursuant to the provisions of the Labour Disputes Investigation Act, 1913, govern the conditions of employment

of the members of the plaintiff Association who were employed by the first defendant on that date ?

The agreement referred to was the successor of earlier agreements, one of November 17, 1949, a term of which was that it was to continue in force until October 31, 1950, unless previously superseded, and a second agreement made on October 3, 1950, superseding the former agreement, and to continue in force until October 31, 1951, unless previously superseded. The agreement of December 3, 1950, superseded that of October 3, 1950, was approved by the Court of Arbitration for the purposes of the Economic Stabilization Regulations, 1950, on December 22, 1950, and was filed with the Clerk of Awards at Wellington on December 22, 1950.

This agreement was expressed to bind :

all members of the Association who are male officers in receipt of a salary exceeding £479 15s. 3d. per annum apart from overtime and also all members of the Association who are female officers in receipt of a salary exceeding £271 per annum apart from overtime ; provided in all cases that these officers are not specifically bound by an industrial award or industrial agreement governing the class of work which they carry out for the Corporation.

On October 30, 1950, the Court of Arbitration made an Award which, so far as the provisions relating to the rates of wages to be paid were concerned, was to be deemed to have come into force on April 1, 1950, and, so far as all other provisions of the Award were concerned, was to come into force on the day of its date. It was expressed to apply to officers of the Council (with certain exceptions not material to these proceedings), and excepted as well " male officers in receipt of a salary of more than £650 per annum apart from overtime and female officers in " receipt of a salary of more than £400 per annum apart from overtime."

*S. G. Stephenson*, for the plaintiff.

*F. H. Jones*, for the first defendant.

*Cleary*, for the second defendant.

*Cur. adv. vult.*

GRESSON, J. [After setting out the facts, as above :] The question before the Court is really whether those members of the Association who were members when the agreement of December 3, 1950, was entered into are bound as to conditions of employment by the terms of that agreement, or whether their conditions of employment are those prescribed by the Award. The agreement was made pursuant to the provisions of s. 8 of the Labour Disputes Investigation Act, 1913. Section 3 of that Act provides that it shall apply only to societies of workers (whether incorporated or not, and whether registered under any Act or not) and to the members of any such society who are not, for the time being, bound by any award or industrial agreement under the Industrial Conciliation and Arbitration Act, 1908, and to the employer or employers of any such workers.

It was submitted that the right of making such an agreement as was here made was given by statute, and was not to be subject to frustration by an award's being made embracing some of those matters covered by the agreement. It would seem that the right is conferred for the benefit of those who are not for the time being covered by an award, and that there is no warrant for an implication that the Court of Arbitration cannot make an award covering persons whose terms of employment have been the subject of an agreement. Jurisdiction is conferred upon the Court of Arbitration in unrestricted terms. Where an award exists in which the class of persons affected is defined by reference to a maximum



salary, it is quite competent for persons unaffected by the award to avail themselves of the procedure provided by the Labour Disputes Investigation Act, 1913, but that is not to say that the jurisdiction of the Court of Arbitration is ousted so as to preclude it from making an award enlarging the class of persons affected by earlier awards by the fixation of a different and higher salary figure.

What, in effect, the plaintiff really seeks is to obtain a ruling whether certain persons are bound by the Award or by the agreement, but it is not these persons who have brought the proceedings. It appears to me that the first question for the Court to consider is whether the present summons is one on which the Court should make a declaratory order, having regard to the discretion vested in the Court under s. 10 of the Declaratory Judgments Act, 1908. I am in considerable doubt whether the plaintiff is a "person" entitled to bring an application under s. 3 of the Declaratory Judgments Act, 1908. The plaintiff is not a person within the first paragraph of that section, nor is the plaintiff a person claiming "to have acquired any right under any such statute, regulation, by-law, deed, will, document of title, agreement, memorandum, articles, or instrument." The words of the section "or to be in any other manner interested in the construction or validity thereof" are very general words, and it might seem, on a literal reading, that these authorized the plaintiff to bring this application; but it has been held that those words are to be construed as *ejusdem generis* with the preceding words: *New Zealand Educational Institute v. Wellington Education Board* [1926] N.Z.L.R. 615, 618. Moreover, on other grounds it appears to me inexpedient that the Court should make a pronouncement on this summons. The Court is being asked in effect to determine who are or who are not within the scope of the Award made by the Court of Arbitration. The whole matter is one peculiarly within the scope of that Court.

The Arbitration Court is the proper tribunal for the interpretation of awards. Not only has it jurisdiction to interpret its own awards, but as well it has been given express power (by the Industrial Conciliation and Arbitration Amendment Act, 1947, s. 9 (1)) to pronounce upon any question connected with the construction of any award or industrial agreement, or upon any particular determination or direction of the Court, or upon the construction of any statute relating to matters within the jurisdiction of the Court.

Having regard to the special and exclusive jurisdiction of the Court of Arbitration in the making of industrial awards, and having regard to the fact that the matters raised in this summons are matters in the industrial sphere, I think such intervention on the part of this Court in the business of the Court of Arbitration as the answering of the questions submitted by this summons would compel, would be contrary to the spirit and purpose of the Industrial Conciliation and Arbitration Act, 1925. The Legislature having created a special Court to deal with the matters with which this application is concerned, I do not think this Court should determine the questions now submitted to it, since to do so would be at the same time to interpret in a somewhat oblique fashion an Award made by the Court of Arbitration. For these reasons, in my opinion, it is undesirable and inexpedient to give or to make such a declaratory order as is here sought. The originating summons is accordingly dismissed. There will be no order as to costs.

#### *Summons dismissed.*

Solicitors for the plaintiff: *Stephenson and Anyon* (Wellington).

Solicitor for the first defendant: *City Solicitor* (Wellington).

Solicitors for the second defendant: *Barnett and Cleary* (Wellington).

[IN THE COURT OF APPEAL.]

STRATFORD BOROUGH AND ANOTHER v. C. A.  
WILKINSON, LIMITED.

COURT OF APPEAL. Wellington. 1951. June 14; July 13. NORTH-  
CROFT, J.; FINLAY, J.; HUTCHISON, J.; COOKE, J.

*Municipal Corporations—Roads and Streets—Reduction of Street Width—Onus on Council to prove Compliance with Statutory Requirements—Prescribed Procedure not carried out—No Jurisdiction for Magistrate to hear Objections—Municipal Corporations Act, 1933, s. 175 (4), Fifth Schedule, cls. 5, 6, 7.*

It is provided in cl. 6 of the Fifth Schedule to the Municipal Corporations Act, 1933, relating to the stopping of streets, that the public meeting to be held under the chairmanship of the Mayor "shall decide by a majority of the "district electors present whether or not the street shall be stopped."

The Stratford Borough Council on March 20, 1950, passed a resolution to take the necessary steps to diminish the width of part of P. Street. The Council called the meeting of the electors required by cls. 5 and 6 of the Fifth Schedule to the Municipal Corporations Act, 1933; and, at the meeting, a resolution in favour of the Council's resolution was declared to have been carried on the voices. Eighty electors were present. There was a conflict of evidence as to whether a majority of the electors present voted for the Council's resolution, and there was no proof of a count of those who voted for it.

As required by cl. 7 of the Schedule, the Council sent to the Magistrate the plans of the proposed alterations to the street and the electors' decision thereon. The learned Magistrate sat to consider objections, when a preliminary objection was taken on behalf of the plaintiff to the effect that the procedure set out in the Fifth Schedule had not been complied with. The learned Magistrate refused to go into this question, but adjourned his inquiry to enable the plaintiff to raise the matter in the Supreme Court.

On a motion for certiorari and prohibition to prevent the Borough and the Magistrate from proceeding further with steps to diminish the width of the street, *Fell, J.*, made an order for the issue of a writ of certiorari restraining the Borough from proceeding with steps to diminish the width of the street (*Ante*, p. 16).

On appeal from such order,

*Held*, 1. That a decision of "a majority of the district electors present" cannot be said to have been made when the sense of the meeting was taken by a method that could not, in the circumstances, form a basis for any conclusion as to whether or not the majority of those present voted for the resolution.

2. That, as the respondent had shown that matters were conducted in such a way that the chairman of the meeting had not the material before him on which to base a declaration that the motion was carried by the majority of the electors present, and so was not justified in declaring it to have been so carried, that was sufficient to shift the burden of proof and to throw on the appellant Borough the onus of proving that the resolution was passed by the necessary majority, an onus which it had not discharged; and the chairman's declaration, therefore, must be treated as of no effect.

*Labouchere v. Earl of Wharnccliffe* (1879) 13 Ch.D. 346 applied.

*The Queen v. Thomas* ((1883) 11 Q.B.D. 282), *Everett v. Griffiths* ([1934] 1 K.B. 941), and *The King v. Hendon Rural District Council, Ex parte Chorley* ([1933] 2 K.B. 696) distinguished.

3. That there was no power to make the application to a Magistrate under cl. 7 unless the antecedent statutory requirements had been complied with (one of which was that there must have been a decision of the majority of the electors present at the meeting that the street shall be stopped), because those antecedent statutory requirements were the essential preliminaries to the inquiry by the Magistrate, or conditions precedent to his jurisdiction; and, accordingly, it was within the competence of the Court of Appeal to determine whether or not those essential preliminaries or conditions were present.

*Colonial Bank of Australasia v. Willan* ((1874) L.R. 5 P.C. 417) and *Ex parte Wake* ((1883) 11 Q.B.D. 291) followed.

*The Queen v. Bolton* ((1841) 1 Q.B. 66; 113 E.R. 1054), *The King v. Mahony* ([1910] 2 I.R. 695), and *The King v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128) distinguished.

*In re Mulcahey* ([1928] N.Z.L.R. 129) referred to.

4. That, although under cl. 7 the inferior tribunal may, at its peril, determine whether the facts necessary for its jurisdiction exist, the position nevertheless is that the existence or otherwise of the facts, if questioned, is ultimately a matter open to examination on certiorari by a superior Court.

5. That the requirement as to decision by a majority of the electors present contained in cl. 6 of the Fifth Schedule is a statutory requirement enacted for the general public benefit; and the respondent could not by any admission, or by anything that might, in the circumstances, amount to a waiver, disable itself by alleging that the resolution was not properly passed.

*In re A Bankruptcy Notice* ([1924] 2 Ch. 76) followed.

Appeal from the order of *Fell, J.* (*Ante*, p. 16), dismissed.

APPEAL from an order made by *Fell, J.* (*Ante*, p. 16), for the issue of a writ of prohibition directed to the appellants, restraining them from further proceeding with a certain application made by the appellant Corporation under the provisions of s. 175 (4) (h) of, and the Fifth Schedule to, the Municipal Corporations Act, 1933, and relating to the closing of part of Portia Street in the Borough of Stratford. The circumstances which gave rise to the proceedings for the writ were stated and explained in the judgment of the learned Judge (*Ante*, p. 17, l. 9).

*Grey*, for the appellant Corporation. The respondent was not entitled to prohibition, whatever the correct method of voting was, whether the majority was for or against the resolution, because the Magistrate was granted by the statute jurisdiction to consider objections, particularly by cl. 8 of the Fifth Schedule. His jurisdiction depends on the nature of the application under cl. 8 of the Fifth Schedule of the Municipal Corporations Act, 1933, and not on the truth of the matters alleged in it. Lack of evidence is not lack of jurisdiction. The proper remedy is an action for a declaration or for an injunction. Section 175 (4) (h) possibly makes the stopping of the street conditional upon the outcome of certain procedure. That does not affect the power of the Magistrate under cl. 5 of the Fifth Schedule, which is not conditional upon the performance of other requirements of that Schedule. The remedy is not by way of prohibition; it is by way of declaration or injunction.

The votes at the meeting and the method of voting were valid, and the decision of the majority was valid, although there was no count.

25 The onus of proof was on the respondent to show that the electors could not legally or validly vote by voices, but that they must vote by show of hands or otherwise. It follows that, if the evidence contained

in the affidavits as to the carrying of the resolution on the voices is not admissible, then the respondent must fail. The respondent by its solicitor and agent refused the offer of a division by a show of hands when that count could have been made. It must accept that position, because it was an admission by conduct that the decision of the majority of the electors was in favour of closing the western side of Portia Street. If it was not an admission, it amounted to a waiver, as it allowed the appellant Corporation to proceed in the belief that the decision of the meeting to close part of Portia Street was undisputed.

10 The onus was on the respondent to prove that the resolution was not properly passed. That is its own allegation by reason of the facts that the onus was wrongly placed on the appellant Corporation, that the evidence was misinterpreted, and that what in substance was evidence for the appellant Corporation was turned into evidence against it.

15 As to the Magistrate's jurisdiction: The learned Judge said that the Magistrate had no jurisdiction under cl. 8 of the Fifth Schedule (*Ante*, p. 19, l. 12) to deal with the application before him; if so, these proceedings do not lie: *Ex parte Mullen, Re Hood* ((1935) 35 N.S.W.S.R. 289, 295, 296). A plaintiff has to show an absence of jurisdiction: 20 Code of Civil Procedure, R. 263: see *The King v. Mahony* ([1910] 2 I.R. 695, 709, 710, 713), *Ex parte Wake* ((1883) 11 Q.B.D. 291), *The King v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128, 151, 152, 153), and *Parisienne Basket Shoes Pty., Ltd. v. Whyte* ((1938) 59 C.L.R. 369, 391).

The Magistrate is given jurisdiction by cl. 8. He has not the power to inquire into proceedings of the Council, but he has to consider proposals put in front of him. There is nothing to indicate in any way that his power is dependent on any of the matters set out in cls. 1-7 of the Fifth Schedule. It would be inconvenient to the Magistrate if he did not have jurisdiction of this nature, because, if it were otherwise, when any question was raised as to performance of the matters set out in the Fifth Schedule, he would not know whether he could go on or not; and it follows that his jurisdiction cannot be dependent upon something earlier in the procedure set out in the Fifth Schedule, cl. 5, such as whether the voting was improperly conducted: see *The Queen v. Thomas* ((1883) 11 Q.B.D. 282), 35 *Ex parte Orde, In re Horsley* ((1871) L.R. 6 Ch. 881), and *Clive Road Board v. Guy* ((1890) 9 N.Z.L.R. 521, 533). The result of the voting can be obtained from the voices: *The Queen v. Thomas* ((1883) 11 Q.B.D. 282, 284), *Everett v. Griffiths* ([1924] 1 K.B. 941, 953), and *The King v. Hendon Rural District Council, Ex parte Chorley* ([1933] 2 K.B. 40 696, 703). Votes may be given in many ways: the fact that the voters gave their votes silently, and not by any oral expression, seems to make no difference, because they indicated that they were all in agreement: *Labouchere v. Earl of Wharncliffe* ((1879) 13 Ch.D. 346, 354). As to the onus of proof, see *Kimpton v. Willey* ((1850) 19 L.J.C.P. 269, 271, 45 272) and *Avards v. Rhodes* ((1853) 8 Ex. 312; 155 E.R. 1369). If it is essential to the Magistrate's jurisdiction that these matters in question be proved, then the onus was upon the respondent to prove them in the Court below: *Official Assignee v. Khoo Saw Cheow* ([1931] A.C. 67, 70, 71). Alternatively, if the onus is on the appellant, it has been discharged 50 by the statutory declaration of the chairman of the meeting, the Mayor of Stratford, who was appointed under the Schedule. His declaration that the resolution was properly carried is binding: *Anthony v. Seger* ((1789) 1 Hag. Con. 9; 161 E.R. 457). If the evidence of others present at the meeting is admissible to show that the resolution was carried, it is 55 not necessary to have an actual count. If the onus of proof was on the

respondent as plaintiff in the Court below, then, on the affidavits filed by it, it failed to prove that the resolution was not carried—if that is a necessary factor in the jurisdiction (which is denied).

The respondent has sought to argue that prohibition or certiorari can be directed to the appellant separately. In this case, the Council has not acted judicially; all that it is doing is applying to the Magistrate as a consequence of the meeting and resolution of the electors. Such rights would not lie against the Council, for the reason that it is not a judicial body: *The Queen v. London County Council, Re Empire Theatre* (1894) 71 L.T. 638, 640. The letter written by Mr. Percy Thomson to the Registrar on the day after the meeting is an admission that the resolution was properly carried at that meeting, but he does not suggest that it was not so carried.

*Spratt*, for the respondent. The essential fact that emerges from the affidavits is that there is no material on which any statement that a resolution was or was not carried could be made. There is not even any evidence of a declaration by the chairman of the meeting of the passing of a resolution in the terms of the statute.

No method was adopted whereby, according to *Labouchere v. Earl of Wharnccliffe* (1879) 13 Ch.D. 346, 354, it could be seen (i) how many people were present, (ii) how many voted for the resolution, (iii) how many voted against it, and (iv) how many were silent. There was no declaration by the chairman of the meeting in the terms of the statute. Having heard certain voices for and against, and not knowing how many people were silent, he declared the resolution carried. If he had been dealing with a resolution which could lawfully have been carried on the voices, that might *prima facie* have been sufficient to show the passing of the resolution. There are no rules such as are found in regard to companies, that the chairman's minute of a declaration establishes either *prima facie* or conclusive evidence. Here, the minute is what is said by the Mayor and the Town Clerk a week after the meeting, because that minute is dated March 26.

There does not arise in this case the question of the onus of proof of the number of persons present, the number of persons voting one way or another, and the number of persons being silent. There is before the Court something which is now incapable of proof—namely, how many persons attended and how many voted. The learned Judge, however, said that there were eighty persons present (*Ante*, p. 17, l. 39), and this is not challenged. He must have had in mind the voting on the amendment, which was 32 plus 12, and it can be assumed that those thirty-two voting against the amendment would be for the resolution (*Ante*, p. 17, l. 34). His Honour took the Town Clerk's count, and said that it did not matter whether there were seventy-seven or eighty-four persons present (*Ante*, p. 17, l. 40). The learned Judge's judgment is relied on, and his reasoning is respectfully adopted. Alternatively, the respondent says that the onus is on the appellant, not merely to prove exact figures with regard to the voting, but to prove, in fact, that the resolution was put and carried in terms of the statute. The Borough is seeking to exercise statutory powers, and, before it can exercise those powers in any degree, it must show that the steps prescribed by the statute have been duly taken. At any stage, where the procedure is called into question, the Borough must be able to show that it has observed the conditions attached to the exercise of its powers: *In re Drury Coal Co., Ltd.* (1908) 28 N.Z.L.R. 105 and *In re Citizens Theatre, Ltd.* ([1946] S.C. (Ct. of Sess.) 14, 17).

Where there is no prescription as to any particular method of voting, the common-law rule is that the vote should be taken by a show of hands, and any person dissatisfied with the declaration on the show of hands has the right there and then to demand a poll: *8 Halsbury's Laws of England*, 2nd Ed. 59. The question is not: "Was this resolution passed by a particular majority or not?" It is: "Was it capable of being such a resolution as is required by the statute?" The resolution was never validly submitted to the meeting. It is not possible to extract from the affidavits any statement as to the number who voted against or the number who voted for the resolution or the number who remained silent, and it is the silent vote here, as in *Labouchere v. Earl of Wharnccliffe* (1879) 13 Ch.D. 346, 354, that would carry the day; and it by no means follows that, if there had been a vote put to a show of hands, any of those silent people would have put up their hands one way or the other.

Where a vote or resolution is challenged, whether by a member of the meeting or by a person affected by the resolution who has a standing in law, the onus is on the person supporting the resolution to show that it has been carried. If he has so conducted himself or the meeting as to produce a result that is incapable of computation, he has not discharged his onus. The litigant who asserts must prove: *Phipson on Evidence*, 8th Ed. 27.

The Borough, having gone before the Magistrate, must be prepared, if challenged, whether in the Supreme Court or before the Magistrate, to show that the facts which give rise to the jurisdiction of the Magistrate did exist, and, where there are statutory powers conferred on a body or an individual, those powers are usually to do something which otherwise would be wrong. Here, it would be wrong to stop a street, once it was dedicated to the public, in the absence of some statutory power. Here, the Borough proposes to stop a street, and says that its statutory power to do so is given by s. 175. The stopping would be a nuisance unless it were supported by some statutory authority: *24 Halsbury's Laws of England*, 2nd Ed. 31.

On the general question of onus: When a common-law right of the burgesses under the guise of an exercise of statutory authority is challenged because of the want of performance of an essential condition, the person seeking to exercise that right must be prepared to show the fulfilment of the condition (*Ante*, p. 19, l. 1).

The question of whether or not prohibition will lie as against the Borough is immaterial, because, if the order is bad in that respect, it is not good with regard to the learned Magistrate. If it is not good with regard to the learned Magistrate, then possibly the prohibition as against the Borough may fail. The proceedings before the Magistrate may be brought before this Court on a writ of prohibition properly issued. *In re Symons v. Mayor, &c., of Foxton* (1905) 25 N.Z.L.R. 59, 61 is distinguishable from the present case; but, if necessary, it can be argued that, where jurisdiction depends upon the existence of special facts, it is for the Court proposing to assume that jurisdiction to satisfy itself about the existence of those facts: *8 Halsbury's Laws of England*, 2nd Ed. 391. In *Symons's* case (1905) 25 N.Z.L.R. 59, the question was not an irregularity under the Schedule to the Municipal Corporations Act, 1933; it was an irregularity in proceeding by way of ordinary resolution. Here, there is a question of a resolution of the electors which the Magistrate was called upon to confirm or refuse, and it is for the Magistrate himself to satisfy himself that there is a decision by the electors. There, the

objector sought to establish that, at some point anterior to the resolution of the electors, the Magistrate had no power to inquire into the proceedings of the Council. The respondent's interest in this matter is that of an occupier and owner of adjoining land. Mr. Percy Thomson was present as an elector, and not in any other capacity, and he had made an objection when notices were first issued by the Council: Municipal Corporations Act, 1933, ss. 2 ("elector"), 6 (1) (a) (b). The respondent was not present at the meeting by any nominee, and there was no district elector who had the right to be there on its behalf. If any waiver of the statutory right were possible in so far as Mr. Thomson himself was concerned, there was no waiver of the right of the respondent or any other person. The respondent company cannot be said to have been present at this meeting either by Mr. Percy Thomson or by anyone else. Because the respondent company was silent as an objector, it cannot, by its silence, waive something that only an elector can waive. There is nothing that can be waived. The right to vote is a public right, shared by all electors and by all occupiers and owners of property. Waiver must be of the nature of an estoppel if it is to exist at all: *13 Halsbury's Laws of England*, 2nd Ed. 412, para. 455, and *In re A Bankruptcy Notice* ([1924] 2 Ch. 76, 96). There is no evidence here of any estoppel, by words or conduct, as to a representation of fact. What the respondent is said to have assented to is that a resolution should be taken to have been passed in a manner not permitted by the statute—i.e., consenting to an illegal transaction. Moreover, the doctrine of estoppel cannot be invoked in connection with requirements which the Legislature has laid down in the public interest.

*Grey*, in reply. Until the Borough stops the street, nothing has been done that should not be done: *In re Drury Coal Co., Ltd.* ((1908) 28 N.Z.L.R. 105). In the Fifth Schedule to the statute, there is no requirement that the votes should be registered or counted in any particular way: *Honeybone v. Glass* ([1908] V.L.R. 466, 469). There is nothing in *Anthony v. Seger* ((1789) 1 Hag. Con. 9; 161 E.R. 457) which supports the statement in *8 Halsbury's Laws of England*, 2nd Ed. 59, dealing with the common-law vote. The argument that the resolution was never properly put to the meeting was never raised in the lower Court. The Magistrate's duty is to inquire further into what happened at the meeting, and the dicta in *In re Symons v. Mayor, &c., of Foxton* ((1905) 25 N.Z.L.R. 59, 61) prevented him from doing so. Whatever the legal position may be, the conduct of the person applying for prohibition is taken into account.

*Cur. adv. vult.* 40

The judgment of the Court was delivered by

COOKE, J. It is not disputed that the requirements of the first five clauses of the Fifth Schedule were complied with; and the contest in the proceedings relates to the provisions of cls. 6, 7, and 8 of that Schedule, and, in particular, to those of cl. 6, prescribing the majority that is necessary for a decision at any meeting that is called pursuant to cl. 5. It is provided by cl. 6 that:

such meeting shall decide by a majority of the district electors present whether or not the street shall be stopped.

It is convenient to turn at once to the evidence relating to the manner in which the sense of the meeting was taken. It is common ground—or is at least undisputed on the evidence—that that was done on the

voices, and on the voices alone. There is, however, a contest on the affidavits as to the number of district electors present—they being the only persons entitled to vote—and likewise a contest as to the proportion of those present and qualified to vote who actually voted in favour of the motion. Four of the deponents who have made affidavits for the respondent speak on those questions. Two of them, who put the number of the district electors present at the meeting at between 100 and 120, say, in effect, that the number of voices for the motion was not greater than about one-third of that number. Another of them, who puts the number of electors present at not fewer than 150, says that not more than one-third of them voted on the motion at all. The fourth, who puts the number present at from 130 to 150, estimates that not more than one-third of them voted on the motion, whether for or against.

The evidence for the Corporation on the question of the number of district electors present shows that one deponent, who was concerned to know whether the number of chairs originally in the hall would have been sufficient for the meeting without the use of other chairs that he had borrowed, at some stage counted the number of persons present to be eighty-seven, substantially all of whom he knew to be district electors; and that the Town Clerk several times counted the number of electors present, and that, according to his count, at the time of the putting of the resolution relating to Portia Street, the number of electors present was not more than seventy-seven, though the number increased somewhat afterwards, when another matter was being dealt with. On that evidence, the learned Judge in the Court below assessed the number of district electors present when the resolution was put at eighty (*Ante*, p. 17, l. 39).

On the question of the proportion of electors present who voted for the resolution, six deponents have made affidavits for the Corporation. Three of them say in terms, or in effect, that they have no doubt that the resolution was carried by a majority of those present. Of the others, the Mayor says that the volume of "Ayes" was loud and decisive, and indicated to him that practically all electors present had voted in favour of the resolution; the Town Clerk says that the resolution was carried by an overwhelming majority of electors present; while the third (a councillor), says that it was carried most decisively, and was clearly carried by a majority of those present.

It is necessary next to consider the question of the value, for present purposes, of the evidence to which we have referred. It is to be remembered that the statutory requirement is that there is to be a decision by a majority of the district electors present, and it is plain, we think, that it cannot be said that such a decision was made if the manner of ascertaining the views of those present at the meeting was such that it was impossible to say whether or not a majority of them were in favour of it.

The difficulty was created by the fact that it was not merely a majority that had to be determined, but a majority in relation to all those present, so that those who were qualified to vote but did not do so had to be taken into account. The difficulty was not resolved if only one voter, as is alleged in one of the affidavits, voted "No," for it appears to us that, in the circumstances, it was impossible to tell from sound alone whether a majority of those present voted for the resolution. Indeed, it seems to us that it would even have been impossible from sound alone to say whether a majority of those present voted on the motion at all, whether for or against. If a meeting at which those present are called upon to



vote in the manner that was adopted in the present case consisted of comparatively few persons, it would often be possible to ascertain from sound alone whether and how a majority of them had voted; but the meeting in the present case consisted of not less than about eighty persons, and, in those circumstances, it was, we think, impossible to tell merely from sound whether or not a majority of those present voted in favour of the resolution.

For those reasons, we think that the statements in the affidavits filed for the respondent to which we have referred must be treated as merely opinions or estimates too uncertainly based to be sufficient to constitute even *prima facie* evidence that a majority of those present did not vote for the resolution. So, also, the affidavits filed for the Corporation are, we think, for the same reason, insufficient to afford even *prima facie* evidence that a majority of those present did in fact vote for the resolution.

We think, therefore, that none of the statements to which we have referred is of any value either way, and that it follows that the matter is left in a position in which no more can be said than that the sense of the meeting was taken by a method that, for the reasons we have given, could not, in the circumstances, form a basis for any conclusion as to whether or not the majority of those present voted for the resolution.

The learned Judge held that, the steps taken by the Council having been challenged, the onus was on the Corporation to prove that the requirements of the Fifth Schedule were complied with. If that be where the onus rests, we agree with him that the Corporation has not discharged it. It was, on the other hand, contended for the Corporation that the onus is on the respondent to prove that the resolution was not passed by the necessary majority. If, however, that contention be correct, it cannot avail the Corporation in these proceedings, for the following reasons. It is clear that the only method that was adopted of ascertaining the sense of the meeting was a method that, as we have indicated, cannot show, or even give rise to any inference as to, whether or not a majority of those present voted in favour of the resolution. The respondent has thus shown that matters were conducted in such a way that the chairman of the meeting had not the material before him on which to base a declaration that the motion was carried by the majority of the electors present, and so was not justified in declaring it to have been so carried. That, in our view, is sufficient to shift the burden of proof and to throw on the Corporation the onus of proving that the resolution was passed by the necessary majority—an onus which, as we have said, the Corporation has not discharged.

We have so far dealt with the matter upon the language of cl. 6 of the Fifth Schedule, and without reference to authority. It is desirable, however, to refer shortly to certain decisions to which we were referred. *The Queen v. Thomas* ((1883) 11 Q.B.D. 282), *Everett v. Griffiths* ([1924] 1 K.B. 941), and *The King v. Hendon Rural District Council, Ex parte Chorley* ([1933] 2 K.B. 696), all of which were cited for the Corporation in support of the submission that voting can be on the voices or in other different ways, do not, in our opinion, touch the question whether it is possible to ascertain on the voices the decision of a majority of those present. On the other hand, the observations of *Sir George Jessel, M.R.*, in *Labouchere v. Wharmcliffe* ((1879) 13 Ch.D. 346, 354), in which case "the votes of two-thirds of those present" were necessary in order to carry a certain resolution, appear to us to lend strong support to what we have said.

It is desirable to say that the affidavits of the Mayor and the Town Clerk each say that the former as chairman declared the resolution carried. It was suggested for the respondent that that was not a declaration that the resolution was carried by the requisite majority. We doubt whether that suggestion is sound; but it is unnecessary to consider it, because, if the declaration was a declaration that the resolution was carried by the requisite majority, it was, in view of what happened, insufficient to constitute even *prima facie* evidence to that effect.

It is to be observed that, in the case of a decision under cl. 6 of the Fifth Schedule, there is no provision similar to that contained in Art. 50 of Table A of the Companies Act, 1933, making the declaration of the chairman conclusive in the absence of a demand for a poll. Even if there had been such a provision in the present case, the manner in which the motion was submitted to the meeting might well have prevented the declaration from being effective; but we think that, in the absence of such a provision, the declaration must, for the reasons we have given, be treated as of no effect. It therefore does not create any difficulty in the respondent's way.

It was contended before us that the point that the motion was not properly put to the meeting was not raised in the Supreme Court. We think, however, that para. 9 of the statement of claim is wide enough to cover the point; that the point is so closely related to the submissions that must have been made to the Supreme Court as to be inseparable therefrom; and that it is substantially to this very point that the learned Judge refers when, as the basis of his judgment, he expresses the view that there is no proof that there was a count of those who voted for the resolution, either on a show of hands or by some other effective method. In any case, the affidavits plainly show that the point is not one that could be cured by evidence, and we think it was open to the respondent here.

What we have said does not, however, dispose of this appeal, because it was contended for the Corporation that, whatever be the correct method of voting, and whatever be the actual result of the voting, the Magistrate, having had the matter placed before him in apparent compliance with the provisions of cl. 7 of the Fifth Schedule, has jurisdiction to deal with it, and therefore the writ cannot go. By the second sentence of that clause, it is provided as follows:

If the meeting decides that the street may be stopped, the Council shall send the plans aforesaid, with a full description of the proposed alterations, and with the electors' decision thereon, to the Magistrate.

It was said that, when a Magistrate receives the plans, description, and electors' decision from the Council in a form that is *ex facie* in order, he has jurisdiction to hear and decide the matter, and that submission was supported on the principle that, in criminal proceedings before Justices or Magistrates, it is the nature of the charge that establishes jurisdiction. That principle is, of course, indisputable: *The Queen v. Bolton* (1841) 1 Q.B. 66; 113 E.R. 1054, *The King v. Mahony* ([1910] 2 I.R. 695, 709, 710), and *The King v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128, 151-158); and it was sought to apply it to the present case by treating the application made by the Corporation to the Magistrate under cl. 7 of the Fifth Schedule as analogous to the laying of a charge before a Justice or a Magistrate. In our opinion, however, no such analogy exists. When a charge has been well laid and is, on its face, within the jurisdiction of a Magistrate, the latter has jurisdiction to inquire into it; but, in cases such as the present, there is a great deal more than the

mere making of the application to the Magistrate to consider, because there is no power to make that application at all unless certain antecedent statutory requirements have been complied with, one of which is that there must have been a decision of the majority of the electors present at the meeting that the street shall be stopped. In our view, those antecedent statutory steps constitute what the Judicial Committee in *Colonial Bank of Australasia v. Willan* ((1874) L.R. 5 P.C. 417, 443) called "essential preliminaries to the inquiry" (*ibid.*, 443), and what *Cave, J.*, in *Ex parte Wake* ((1883) 11 Q.B.D. 291), called "conditions precedent to the jurisdiction" (*ibid.*, 297): see also *In re Mulvaney* ([1928] N.Z.L.R. 129, 133). That being so, we think it is within the competence of this Court to determine whether or not those essential preliminaries or conditions precedent were present.

The principle that was laid down by *Lord Esher, M.R.*, in *The Queen v. Income Tax Special Purposes Commissioners* ((1888) 21 Q.B.D. 313, 319) was stated by the Judicial Committee in *The King v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128) in the following words: "if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard; but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on certiorari by a superior Court" (*ibid.*, 158). We think that what was there said shows that, although in such a case the inferior tribunal may, at its peril, determine whether the facts necessary for its jurisdiction exist, the position nevertheless is that the existence or otherwise of such facts, if questioned, is ultimately a matter that is within the competence of the superior Court.

It was also contended for the Corporation that the view that the Magistrate has jurisdiction to deal with the matter because the application made to him was *ex facie* in order was supported by certain observations that were made by *Sir Robert Stout, C.J.*, in *In re Symons v. Mayor, &c., of Foxton* ((1905) 25 N.Z.L.R. 59). In that case, *Sir Robert Stout, C.J.*, held that, as no special order had been made by the Council, the street had not been properly closed, and in the course of his judgment he said: "It was argued that the Magistrate's order under section 5 of the Seventh Schedule was conclusive. No doubt it is conclusive of all matters over which the Magistrate has jurisdiction. But the Seventh Schedule does not confer jurisdiction on the Magistrate to inquire as to whether the proceedings of the Council have been regular. What the Magistrate has to do is to consider the alterations, and the objections made by persons likely to suffer injury, and that is all. It may be, though this, I think, is doubtful, that he might confirm the decision though the frontage to a street was wholly taken away and no new way provided (section 6 of the Seventh Schedule). He has not, however, to consider the regularity of the proceedings of the Council" (*ibid.*, 61).

It will be observed that the learned Chief Justice there took the view that the Magistrate had no jurisdiction to inquire into the proceedings of the Council. We do not desire to be taken as necessarily assenting to that view, because it appears to us that the matter may fall within the principle laid down by *Lord Esher, M.R.*, in *The Queen v. Income Tax Special Purposes Commissioners* ((1888) 21 Q.B.D. 313, 319), and that the Magistrate may accordingly have jurisdiction to inquire and to decide at his peril whether the antecedent statutory requirements have been complied with. For present purposes, it is, however, unnecessary to consider that question, because it is plain that, if that be so, the question

of jurisdiction nevertheless remains within the competence of the Supreme Court. It is also plain that, in any event, there is nothing in what was said by *Sir Robert Stout, C.J.*, in *Symons's case* ((1905) 25 N.Z.L.R. 59, 61) that is in the least degree inconsistent with the view that the Supreme Court has jurisdiction to determine whether the facts necessary to give the Magistrate jurisdiction do exist. As *Fell, J.*, so clearly said (*Ante*, p. 19, l. 22), that case is not an authority on which an argument can be based that the Supreme Court cannot inquire into the validity of the steps necessary to give the Magistrate jurisdiction.

- 10 It remains to consider one further contention that was advanced on behalf of the Corporation. It was said that the respondent by its solicitor and agent refused an offer by the chairman of a division by a show of hands, and that that refusal constitutes an admission by conduct that a majority of the electors present were in favour of the resolution, or, alternatively, constitutes a waiver by the respondent of the requirement that such a majority is necessary. It was also said that the statement that the proposal "was carried" (contained in the letter from the respondent's solicitors written the day after the meeting) constitutes an admission that the resolution was passed by the necessary majority.
- 20 With regard to the first of those matters, there was, on the argument before us, a contest on the questions whether the non-demand of a poll by Mr. Percy Thomson constituted a refusal of the offer that was made, whether he purported to represent the respondent, and whether, if he did purport to do so, he was prevented from effectively doing so because he was not nominated by the respondent under s. 12 of the Rating Act, 1925. To none of those questions do we find it necessary to refer. The requirement as to decision by a majority of the electors present that is contained in cl. 6 of the Fifth Schedule is a statutory requirement, enacted for the general public benefit, and, in our view, the respondent cannot, by any admission, or by anything that might in other circumstances amount to a waiver, disable itself from alleging that the resolution was not properly passed: *13 Halsbury's Laws of England*, 2nd Ed. 402, and *In re A Bankruptcy Notice* ([1924] 2 Ch. 76, 97, 98).

- There are two matters that it is desirable to mention before parting with this appeal. The defendants in these proceedings are the learned Magistrate and the Mayor, Councillors, and Burgesses of the Borough of Stratford. In the heading to the notice of motion on appeal, both the Corporation and the Magistrate are described as appellants, but the body of that document shows clearly that the notice is given on behalf of the Corporation only. The Magistrate has quite properly taken no part in the proceedings at any stage, either here or below, and, as no notice of appeal was given on his behalf, it was wrong to describe him as an appellant. He should, in the circumstances, have been made a respondent to the appeal: *Beckett v. Attwood* ((1881) 18 Ch.D. 54).
- 45 The question, however, is of no practical importance.

- The other matter is this. We think it is unnecessary to consider whether a case in which a Magistrate purports to exercise the jurisdiction conferred on him by the Fifth Schedule falls within the terms of R. 463 of the Code of Civil Procedure, because, in our view, such a case, if it does not fall within the terms of that Rule, is one in which the Magistrate exercises judicial powers conferred upon him by law, and falls within the general principle that the writ of prohibition lies to such a tribunal—a principle that is applied under the authority of R. 604: *The King v. Hendon Rural District Council, Ex parte Chorley* ([1933] 2 K.B. 696,

702) and *Timberlands Woodpulp, Ltd. v. Attorney-General* ([1934] N.Z.L.R. 270).

For the reasons we have given, we have, on the whole matter, come to the same conclusion as *Fell, J.* The appeal is dismissed, and the respondent will have its costs against the Corporation on the middle scale as on a case from a distance.

*Appeal dismissed.*

Solicitor for the appellant Corporation: *Philip Grey* (New Plymouth).  
Solicitors for the respondent: *Percy Thomson and Hugh D. Thomson* (Stratford).

[IN THE SUPREME COURT.]

SHORT AND OTHERS *v.* AUCKLAND TRANSPORT BOARD AND OTHERS.

SUPREME COURT. Auckland. 1951. June 28; July 9. F. B. ADAMS, J.

*Transport—Licensing Authority—Taxicab Service Licence Applications—Eleven Applications heard by Authority—Authority advertising for Further Applications—Further Applications received—Original Applicants asking for Mandamus to compel Authority to hear and determine Their Particular Applications first—Authority's Power to regulate Its Own Proceedings—Sensible and Proper Procedure adopted—General Powers of Authority in hearing Applications—Transport Act, 1949, ss. 101A, 102—Transport Amendment Act, 1950, s. 26 (1).*

The Auckland Transport Board was, by virtue of s. 82 of the Transport Act, 1949, the Licensing Authority for the Auckland Transport District, and the other defendants constituted the Committee, to which, in pursuance of s. 85 (3) of the statute, the Licensing Authority delegated its powers, functions, and duties.

The plaintiffs, eleven in number, made separate applications for taxicab service licences, and their applications, with certain others, which brought the total up to sixteen, were heard by the Committee on April 23 and 30 and May 3, 1951. The Committee reserved its decision, and on May 15, 1951, passed the following resolution;

"(a) That as it is the present view of the Authority that the authorization of additional licences is necessary and desirable, the Authority proposes calling for further applications for the issue of new public taxicab service licences such applications to be lodged at the office of the Authority not later than 4.30 p.m. on Friday, June 8, 1951.

"(b) That the Authority's decision on the applications at present before it is reserved."

In pursuance of this resolution, an advertisement was published inviting applications for taxicab service licences; and, in response, 262 further applications were received.

The plaintiffs claimed that the Licensing Authority, having heard their applications, was bound to dispose of them without regard to any applications received since the conclusion of the hearing.

On motion for a writ of mandamus commanding the Licensing Authority to determine the applications of each of the plaintiffs "on the merits, prior to, and without reference to" the subsequent applicants; for a writ of injunction to restrain the Licensing Authority from considering the subsequent applications until after it had determined the plaintiffs' applications; in the alternative, for a writ of prohibition prohibiting the Licensing Authority from considering the subsequent applications until after it had determined the plaintiffs' applications,

*Held*, That, as s. 93 of the Transport Act, 1949, gave to every Licensing Authority the power to regulate its own procedure, the question raised in the motion was, in substance, one of procedure; but, whether it were so or not, it was competent for the Licensing Authority to act in all respects as it did, as the procedure was sensible and proper, and was the only procedure by means of which the Authority could hope to act with perfect justice to all who might be concerned.

*Newman Brothers, Ltd. v. Allum and S.O.S. Motors, Ltd. (in Liquidation)* ([1934] N.Z.L.R. 694) applied.

*Semble*, 1. That, where a Metropolitan Authority considers an application for a taxicab service licence, the proceedings of the Authority are governed primarily by ss. 101A and 102 of the Transport Amendment Act, 1950. By reason of the provisions of s. 101A, the Metropolitan Authority is no longer required to hold a public sitting or to receive "evidence" or "representations" (though it may presumably do so if it thinks fit), so that, with regard to applications for such licences, the Metropolitan Authority may proceed summarily, while the Licensing Appeal Authority may not do so.

2. That s. 102 does not purport to be exhaustive as to the matters required to be considered; but, as a whole, its purpose is to insist on consideration of the specific matters referred to therein, but to leave the Licensing Authority free to consider other relevant matters which may come before the Authority in the form of "evidence" or "representations" as contemplated by s. 102 (2) (h); and the tribunal is also entitled to exercise its own mind, and give effect to relevant considerations which occur to it, even though they be not referred to in s. 102 or in evidence or representations referred to in subs. 2 (h) thereof.

3. That, consequently, there is no reason why the Licensing Authority should not, in any proper case, gather for itself such materials or information as may assist it in its deliberations, though presumably, in cases where there is a public sitting, the principles of natural justice may require that the tribunal should give to the applicant and other persons affected the same reasonable opportunity to reply in regard to such matters that it is required to give under the proviso to s. 102 (2) (h); but, in cases where there is no public sitting and no formal hearing, as under s. 101A, the right of the applicant and other persons to be heard is limited to their right to be heard on appeal.

4. That there is no ground in the Transport Act, 1949, or in the Regulations made thereunder, specifically requiring a Licensing Authority to dispose of applications either in the order in which they are lodged or in the order in which they are heard, or in any other order.

*Quaere*, Whether, if the plaintiffs had made out their alleged right, it would have been possible for the Court to interfere, or how far such power is now limited by s. 93A of the Transport Act, 1949 (as inserted by s. 25 of the Transport Amendment Act, 1950).

MOTION under R. 466 of the Code of Civil Procedure for relief by way of mandamus, injunction, or prohibition. The statement of claim alleged, and the statement of defence admitted, that the defendant (the Auckland Transport Board) was, by virtue of s. 82 of the Transport Act, 1949, the Licensing Authority for the Auckland Transport District, and that the other defendants constituted the Committee to which, in pursuance of s. 85 (3) of the Act, the Licensing Authority had delegated its powers, functions, and duties. In its capacity as a Licensing Authority, the Board is referred to in the Act as a Metropolitan Authority:

10 s. 82 (2).

The plaintiffs (eleven in number) made separate applications for taxicab service licences, and their applications, along with certain others

which brought the total up to sixteen, were heard by the Committee on April 23 and 30 and May 3, 1951. The Committee reserved its decision, and on May 15, 1951, passed the following resolution :

(a) That as it is the present view of the Authority that the authorization of additional licences is necessary and desirable, the Authority proposes calling for further applications for the issue of new public taxicab service licences such applications to be lodged at the office of the Authority not later than 4.30 p.m. on Friday, June 8, 1951.

(b) That the Authority's decision on the applications at present before it is reserved.

In pursuance of this resolution, an advertisement was published shortly afterwards inviting applications for taxicab service licences, and in response 262 further applications were received. There was no evidence of any decision as to the number of new licences to be issued.

The plaintiffs claimed that the Licensing Authority, having heard their applications, was bound to dispose of them without regard to any applications received since the conclusion of the hearing ; and the purpose of these proceedings was to secure priority as against the 262 applications as yet unheard. The motion was (a) for a writ of mandamus commanding the Licensing Authority to determine the applications of each of the plaintiffs "on the merits, prior to, and with reference to" the subsequent applications ; (b) for a writ of injunction to restrain the Licensing Authority from considering the subsequent applications until after it has determined the plaintiffs' applications ; in the alternative, (c) for a writ of prohibition prohibiting the Licensing Authority from considering the subsequent applications until after it had determined the plaintiffs' applications.

*R. H. Mackay*, for the plaintiffs.

*B. C. Haggitt*, for the defendants.

*Cur. adv. vult.* 30

F. B. ADAMS, J. [After setting out the facts, as above :] Section 101A of the Transport Act, 1949 (enacted by s. 26 (1) of the Transport Amendment Act, 1950), is applicable to the plaintiffs' applications, and reads as follows :

On receipt by a Metropolitan Authority of an application for a taxicab service licence, the Authority may, after making such investigations or inquiries with respect thereto as the Authority thinks necessary in the circumstances of the case, grant or refuse the licence.

Section 101 of the Transport Act, 1949, which renders it necessary in general to hold a public sitting, after due public notice, "for the purpose of receiving evidence and representations in favour of or against the granting of the application," is amended so as to be no longer applicable to an application to a Metropolitan Authority for a taxicab service licence. While the procedure before the Metropolitan Authority on such an application is thus modified into a sort of summary procedure, s. 148 (1A) (also enacted by s. 26 of the Amendment Act, 1950) requires that every appeal to the Licensing Appeal Authority from a decision of a Metropolitan Authority in relation to an application for a taxicab service licence shall be dealt with at a public sitting, and goes on to provide that :

The provisions of subsections one hundred and one and one hundred and two of this Act shall, as far as they are applicable and with the necessary modifications, apply to every such appeal as if it were an application for a transport licence to which those sections apply.

It provides further that the appeal shall be dealt with by the Licensing Appeal Authority as if no decision had been made by the Metropolitan Authority. Section 102 is not amended, and remains by its express terms applicable to "any application for a transport licence"—which, by virtue of s. 2, includes an application for a taxicab service licence—and I do not think it is to be inferred from the wording of s. 148 (1A) that s. 102 is no longer applicable to the consideration by a Metropolitan Authority of an application for a taxicab service licence. The wording, indeed, suggests it, but there is nothing strong enough to overcome the unamended words of s. 102. In such a case, therefore, the proceedings of the Metropolitan Authority are governed primarily by ss. 101A and 102. Section 101A confers the jurisdiction to grant or refuse, and prescribes the mode in which it is to be exercised—i.e., "after making such investigations or inquiries with respect thereto as the Authority thinks necessary in the circumstances of the case"—and s. 102 prescribes certain matters which must be considered in exercising the jurisdiction. (Section 153 and Reg. 9, as enacted by the Transport Licences Emergency Regulations, 1942, Amendment No. 1 (Serial No. 1943/175), prescribe certain further matters to be considered, but, for the purposes of this judgment, it will be sufficient to refer to s. 102, and what is said with reference to that section may be read as including those other provisions.)

As to the mode of exercise prescribed by s. 101A, I think it is clear that the Metropolitan Authority is no longer required to hold a public sitting or to receive evidence of representations—though it may presumably do so if it thinks fit, as happened in this case. Formerly, it was bound to do so in such cases as in other cases, whereas, on appeal, the Licensing Appeal Authority was permitted to proceed in a more or less summary manner: s. 148. With regard to applications for taxicab service licences, the position is now in effect reversed, and it is the Metropolitan Authority which may proceed summarily, while the appellate Authority may not do so.

As to the matters required by s. 102 to be considered, the section does not purport to be exhaustive. There is no express prohibition of the consideration of other relevant matters, and, in my opinion, none was intended to be implied. If justification be needed for this view, I think it may be found in subs. 2 (h), which requires the Authority to take into account "Any evidence and representations received by it at the public sitting," and any "representations" received from certain sources or contained in any duly signed petition. The subsection cannot apply in its entirety, though it may apply in part, where there is no public sitting; but it is relevant in its entirety on the question of construction, and, in my opinion, it shows that the other subsections are not exhaustive of the matters to be considered. Subsection 2 (h) would be otiose as regards "evidence" if it were read as merely requiring the Authority to consider evidence tendered on the matters previously enumerated; and it would seem to be almost equally otiose as regards "representations." This argument may not be conclusive in itself, but, putting merely verbal considerations aside and considering s. 102 as a whole, I think the intention was to insist on consideration of the specific matters referred to therein, but nevertheless to leave the Licensing Authority free to consider other relevant matters. The section is not to be regarded as a sort of mental strait-jacket. Other relevant matters may come before the Authority in the form of "evidence" or "representations," as contemplated by subs. 2 (h), and, in my opinion, the tribunal is also



entitled to exercise its own mind, and to give effect to relevant considerations which occur to it, even though they be not referred to in s. 102 or in evidence or representations under subs. 2 (h). This being so, there is no reason why the tribunal should not, in any proper case, gather for itself such materials or information as may assist it in its deliberations, though presumably, in cases where there is a public sitting, the principles of natural justice may require that the tribunal should give to the applicant and other persons affected the same reasonable opportunity to reply in regard to such matters as it is required to give under the proviso to subs. 2 (h). In cases where there is no public sitting and no formal hearing, as under s. 101A, there will probably be no such obligation, the right of the applicant and other persons to be heard being limited to their right to be heard on appeal.

As to what is "relevant" for the purposes of this paragraph, I say nothing, except that it seems to be a matter peculiarly within the province of the tribunal.

In the present case, the Metropolitan Authority has obviously taken into consideration, upon its own initiative, not only the questions whether additional licences should be granted and whether the plaintiffs and the other contemporaneous applicants are suitable persons to receive such licences, but also the further question whether there may not be other persons who are fitted to receive such licences, and whose claims ought to be considered concurrently with the claims that were before it. I may say at once that this was, from the practical point of view, a sensible and proper course to follow. Even apart from the fact that the Authority has in the past pursued a policy of discouraging futile applications by assuring intending applicants that they will have the opportunity to apply if additional licences are made available, the course followed seems to be the only one that can be regarded as just to all concerned. Unless it could be shown that prior applicants have in law a prior right to a grant—a point to which reference will be made later—the Authority was, in my opinion, abundantly justified in deciding that it would not grant the proposed new licences until it was in a position to consider the claims of all persons who might desire such licences.

It will be observed that neither in s. 102 nor elsewhere is there any reference to the consideration of the possible existence of other persons having better claims than the applicant whose case is under adjudication. But, applying the reasoning set forth above, I think it is permissible for a Licensing Authority to have regard to, and to treat as relevant, the possible existence of such persons; and I see no reason why, if the tribunal imagines that such persons may exist and might apply, it should not take the initiative, by advertising or taking other reasonable steps, to ensure that all persons whose claims ought in justice to be considered are given the opportunity of applying. I think it may lawfully so act whether or not it is proceeding under s. 101A. Where that section applies to the pending application, such investigations or inquiries are, in my opinion, in the words of the section, "investigations or inquiries with respect thereto."

It was not suggested that there is any provision, either in the Act or in the Regulations, specifically requiring a Licensing Authority to dispose of applications either in the order in which they are lodged or in the order in which they are heard, or in any other order. In my opinion, there is no ground for implying any such provision. As an illustration of a statute so providing, I may refer to s. 169 (c) of the Mining Act, 1926, which expressly gives the superior right to the prior applicant. It would, 55

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I think, be wrong to read the Transport Act, 1949, as conferring any such right of priority. In the argument before me, it was contended that the Licensing Authority was bound to proceed on each application as if there were only one licence available and only one applicant, and to 5 disregard any other applications that might have been previously lodged, and *a fortiori* any subsequent or possible future applications. Alternatively, it was suggested that the Licensing Authority was in this case bound to limit its consideration to the sixteen applications that were before it, with the result that, if the licences to be issued were sixteen or 10 less in number, and if a sufficient number of the sixteen applicants measured up to the required standards, the Authority would be obliged to grant the licences to them. I am not prepared to accept either of these contentions. In *Newman Brothers, Ltd. v. Allum and S.O.S. Motors, Ltd. (in Liquidation)* ([1934] N.Z.L.R. 694), there was a somewhat 15 similar contention. Having three applications before him, the Licensing Authority reserved his decision on each until he had heard them all, and *Sir Michael Myers, C.J.*, dealt with the matter as follows: "The contention is that the provisions of the Transport Licensing Act required the Licensing Authority to hear and dispose of the first application 20 "received by him before considering the second, the second before the third, and so on. In my opinion, the complaint is untenable. The matter is one of procedure, and s. 15 of the Act of 1931 says, 'Save as "may be provided by this Act or by regulations under this Act, every "Licensing Authority may regulate its own procedure.' There is 25 "nothing that I can find in either the Act or the Regulations that affects this particular point; and, in my opinion, s. 15 is an effective answer to the plaintiff's complaint. It seems to me, seeing that only one service could be authorized, the Licensing Authority's procedure was 30 "sensible and proper: *R. v. Shann* ([1910] 2 K.B. 418, 432). I venture to think that if he had acted otherwise and heard first and granted the S.O.S. Co's application and then, there being nothing further to consider, refused the other applications, the present plaintiffs would have been "the first to protest" (*ibid.*, 699, 700).

I respectfully agree with this view, and s. 15 of the Transport Licensing 35 Act, 1931, was substantially the same as s. 93 of the Transport Act, 1949, which gives to every Licensing Authority the power to regulate its own procedure. I think the whole question raised herein is in substance one of procedure; but, whether it be so or not, I think it was competent for the Licensing Authority to act in all respects as it did. The procedure 40 was, in the words of *Sir Michael Myers, C.J.*, "sensible and proper" (*ibid.*, 700), and was, indeed, the only procedure by means of which the Authority could hope to act with perfect justice to all who might be concerned.

The plaintiffs have accordingly failed to make out the legal right on 45 which their claim is based, and the motion will accordingly be dismissed.

In the circumstances, it is unnecessary for me to consider whether, if the plaintiffs had made out their alleged right, it would have been possible for this Court to interfere, or how far such power is now limited by s. 93A of the Act (enacted by s. 25 of the Amendment Act, 1950). It 50 was that, in view of s. 93A, cases such as *King v. Frazer* (1944) 5 N.Z.L.G.R. 211 are no longer fully authoritative: cf. *New Zealand Water-side Workers' Federation Industrial Association of Workers v. Frazer* ([1924] N.Z.L.R. 689).

There will be an order for payment by the plaintiffs to the defendants 55 of their costs as per scale as on a claim for £250 (Items 10, 11, and 13

of Table C of the Third Schedule to the Code), with disbursements for fees of Court and other necessary payments, to be fixed by the Registrar.

*Motion dismissed.*

Solicitor for the plaintiffs : *R. H. Mackay* (Auckland).

Solicitors for the defendants : *Earl, Kent, Massey, Palmer, and Haggitt* (Auckland).

## CAMERON v. PAULL.

SUPREME COURT. Auckland. 1951. October 8, 19. FELL, J.

*By-law—Accumulation of Rubbish on Vacant Land—“Suffer to be deposited or to accumulate . . . rubbish”—Knowledge of Successive Deposits of Rubbish—Reasonable Steps open to Defendant to prevent Accumulation not taken—“Suffers.”*

If a man knowingly permits a thing to happen, he suffers it to happen. A man who suffers a thing to happen does not necessarily permit it, as he may not have the physical power or right to stop it; but, if he has that power or right and does not stop it, he suffers it to happen.

*Rockford Rural District Council v. Port of London Authority* ([1914] 2 K.B. 916) and *Berton v. Alliance Economic Investment Co., Ltd.* ([1922] 1 K.B. 742) followed.

An Auckland City by-law was in the following terms :

“419. No person shall :

“(1) Deposit or permit or suffer to be deposited or to accumulate “any refuse or rubbish of any description . . . on any vacant land “not being a place set apart for such purpose by the Council.”

The defendant had been charged with suffering rubbish to accumulate on vacant land, owned by him, in breach of the by-law. He was convicted.

The learned Magistrate found as facts that the defendant had knowledge that successive acts of deposit of rubbish had taken place, and that the defendant's previous erection of a notice prohibiting such acts did not prove effective.

On appeal from the conviction,

*Held*, dismissing the appeal, 1. That the learned Magistrate's finding of fact fixed the appellant with knowledge, and the by-law obliged him to take such reasonable steps as were open to him to prevent the accumulation of rubbish, such as the erection on the street frontage of the vacant land of a suitable fence, which would have provided an effective means of preventing unauthorized deposits of rubbish.

*Bailey v. Pratt* ((1902) 20 N.Z.L.R. 758) and *Doyle v. Gilmer* ((1910) 29 N.Z.L.R. 1168) distinguished.

2. That, as the appellant owned the vacant land, he had the legal right to stop or prevent the accumulation of rubbish, and he had, therefore, suffered it to accumulate in breach of the by-law.

APPEAL by way of case stated from a conviction by Mr. J. W. Kealy, S.M., at Auckland, of the appellant for “suffering rubbish to accumulate “upon vacant land” owned by him, in breach of By-law No. 1, s. 419 (1), of the Auckland City By-laws. Section 419 is in Part V of the by-law relating to public health, and reads as follows :

No person shall :

(1) Deposit or permit or suffer to be deposited or to accumulate any refuse or rubbish of any description . . . on any vacant land not being a place set apart for such purpose by the Council.

In the case stated, the learned Magistrate found the facts, concerning 10 which there was little dispute, to be as follows :

The defendant is one of the owners of the land mentioned in the charge. The land is vacant, and its boundaries are partially, but not completely, fenced. The property, or most of it, falls sharply from the road, and the fencing which has been erected was put up by the City Council, presumably as a safety measure. The unfenced portion of the frontage has a length of some 30 ft., and through this gap it is possible for vehicles to gain access to the property.

Quantities of shavings, sawdust, tins, and other refuse have been dumped on the section, and such dumping has been going on for a period exceeding twelve months. There is no evidence before me to the effect that any of such refuse was deposited by the defendant or by persons who had sought and obtained the authority of the defendant.

A year ago, according to the evidence of the defendant, a notice prohibiting such dumping was erected by the defendant, but "a week later the notice was gone." The defendant has recently erected further notices, apparently as a result of letters sent in March and April last by the Sanitary Department of the Auckland City Council suggesting that such action be taken.

The erection of a suitable fence along the remainder of the frontage would, according to the evidence before me, provide an effective means of preventing further unauthorized dumping.

It was admitted at the Bar that the appellant was a ship's engineer and that he was away most of his time; that he had never seen anyone in the act of depositing rubbish on the land, but that he knew rubbish had from time to time been deposited on, and had accumulated, there; and that the land, which belonged to him and his wife, was vacant land.

*Inch*, for the appellant.

*G. P. H. Hanna*, for the respondent.

*Cur. adv. vult.*

FELL, J. The appellant's contentions before the learned Magistrate were:

(i) That the defendant had not "suffered" the rubbish to accumulate, as the word "suffer" has the same meaning as "permit," which means "actively or positively to consent" to the doing of an act within the knowledge of the party.

(ii) That, as the by-law seeks to impose an absolute liability, it is *ultra vires* and void.

The Magistrate, relying on *Rockford Rural District Council v. Port of London Authority* ([1914] 2 K.B. 916), where *Darling, J.*, says: "If a man knowingly permits a thing to happen he certainly suffers it to happen. A man who suffers a thing to happen does not necessarily permit it, as he may not have the physical power or the right to stop it; but if he has that power or right, and does not stop it, he suffers the thing to happen" (*ibid.*, 924), did not accept the first contention. As to the second, the learned Magistrate, relying on *Berton v. Alliance Economic Investment Co., Ltd.* ([1922] 1 K.B. 742), held that the liability was not absolute and that what was required of the owner was to take reasonable steps, and that the defendant (now appellant) had not taken such reasonable steps as were open to him.

Before me, counsel for the appellant submitted that the appellant could not be convicted of "suffering" unless he knew of the actual depositing, and that it was not enough to know that the rubbish had been deposited, and that, if the acts which caused the accumulating were done without his knowledge, he could not be blamed for not stopping them when he was not aware of them until after their commission; and he quoted *Jull v. Treanor* (1896) 14 N.Z.L.R. 513, *Bailey v. Pratt* (1902) 20 N.Z.L.R. 758, and *Doyle v. Gilmer* (1910) 29 N.Z.L.R. 1168 in support of this submission.

*Jull v. Treanor* ((1896) 14 N.Z.L.R. 513), decided by *Sir James Prendergast, C.J.*, arose on a charge under the Licensing Act, 1881, of selling after hours, the sale being by a person not authorized on that occasion to sell, and is of assistance only in that negligence on the part of the licensee for offences against sections of the Act which impose penalties on the licensee who suffers certain things to be done on his premises, such as gaming, was discussed. *Sir James Prendergast, C.J.*, quotes and refers to two English cases as follows: "*Cockburn, C.J.*, in *Bosley v. Davies* (1 Q.B.D. 84), says, as to the word 'suffer,' 'A man may be said to "suffer" a thing to be done if it is done through his negligence.' "*Matthew, J.*, in *Somerset v. Wade* ([1894] 1 Q.B. 574), says, "Suffering" is not to my mind distinguishable from "permitting." He does not permit drunkenness if he does not know of its existence, or connive at it, or wilfully shut his eyes to it." It does not appear that *Matthew, J.*, would extend the word 'suffer' to cases of honest negligence or want of vigilance. I incline to think, from the expressions "he does use, that he would not so extend the meaning of the word "suffer" or 'permit'" (*ibid.*, 517).

In *Bailey v. Pratt* ((1902) 20 N.Z.L.R. 758), *Denniston, J.*, allowed an appeal against a conviction of a licensee for "allowing" billiards to be played on a Sunday, there being no evidence to prove that the licensee knew, before his coming into the billiard-room where the constable was, that billiards were being played. *Denniston, J.*, says: "I think an examination of the cases justifies my previous statement that there had been no extension of the law as originally laid down in *Bosley v. Davies* (1 Q.B.D. 84), that, though actual knowledge on the part of the licensee or his servants, in the sense of seeing or knowing of the card-playing, was not necessary to be shown, yet some circumstances must be proved from which it could be inferred that they connived at what was going on. No case has decided that pure carelessness on the part of a licensee or his servants will justify a finding that the licensee allowed gaming" (*ibid.*, 764). And later he says: "If the Magistrate had in this case found that the want of reasonable precautions had amounted to wilful avoidance of precautions, with the intention of facilitating gaming in forbidden hours, such a finding would, in my opinion, have justified a conviction. He has simply found, as a conclusion from the facts stated, that the appellant had failed to take reasonable steps to prevent billiards being played. Failure to take reasonable steps amounts only to negligence or carelessness. If I were to hold that negligence or carelessness which is not in itself evidence of connivance, or has not been the means of giving a person in charge the opportunity to connive at a breach of the law, justifies a conviction for 'allowing' gaming, I should, in my opinion, be extending the liability beyond the principle established by previous authority" (*ibid.*, 765, 766).

*Doyle v. Gilmer* ((1910) 29 N.Z.L.R. 1168), decided by *Sir Robert Stout, C.J.*, was an appeal against the dismissal of a charge under a by-law for permitting nightsoil to remain on premises so as to be dangerous to health, and the learned Chief Justice dismissed the appeal, holding (*ibid.*, 1170) that "permit" (and *semble* the word "suffer") points to knowledge being an essential element, and that there was no evidence of knowledge or neglect on the part of the defendant (the italics are mine). It is to be noted that neglect in this case is coupled with knowledge, as though proof of either would justify a conviction, and that the report of the argument shows that the decision of *Denniston, J.*, in *Bailey v. Pratt* ((1902) 20 N.Z.L.R. 758) was not brought to the attention of the Court. Both *Bailey v. Pratt* ((1902) 20 N.Z.L.R. 758) and *Doyle v. Gilmer* ((1910)

29 N.Z.L.R. 1168) were decided before the cases of *Rockford Rural District Council v. Port of London Authority* ([1914] 2 K.B. 916) and *Berton v. Alliance Economic Investment Co., Ltd.* ([1922] 1 K.B. 742).

- Counsel for the respondent pointed out that the offence charged in the present case was not suffering the rubbish to be deposited, but was suffering the rubbish to accumulate, and that accumulation implies a gradual process over a period of time. The learned Magistrate in the case stated finds that the defendant (the present appellant) had "knowledge" that successive acts of deposit of rubbish have in fact taken place, and that the previous erection of a notice prohibiting such acts did not "prove effective." This finding, by which I am bound (it is a finding of fact, and not an inference), fixes the appellant with knowledge, and takes the present case, for this reason alone, outside the decisions in *Bailey v. Pratt* (1902) 20 N.Z.L.R. 758 and *Doyle v. Gilmer* (1910) 29 N.Z.L.R. 1168). If it be held the appellant has knowledge, his counsel submits that the by-law is bad because it seeks to impose an absolute liability.

- It is not necessary for me to decide if an absolute liability would make the by-law bad, and I express no opinion on this, as I have come to the conclusion that the by-law, as submitted by respondent's counsel, permits of two defences (apart from lack of knowledge) to the charge of suffering the rubbish to accumulate:

- (i) That the person charged had no legal right to stop or prevent the accumulation.
- (ii) That it was impossible by the exercise of reasonable care for the defendant to stop the accumulation.

- As to (i), it is to be noted that the by-law says "on any vacant land," not "on any vacant land belonging or leased to the defendant." The by-law could not have been intended to apply to a person who had no legal right to, or interest in, the land, which he could exercise, to prevent the deposit or accumulation of rubbish on the land. As to (ii), *Sir Robert Stout, C.J.*, in *Doyle v. Gilmer* (1910) 29 N.Z.L.R. 1168 refers to the absence of any negligence on the part of the defendant, and in the present case the Magistrate in the case stated says that the erection of a suitable fence would have provided an effective means of preventing unauthorized dumping of rubbish. The learned Magistrate says that, as the erection of notices did not prove effective, the defendant did not take such reasonable steps as were open to him—i.e., fence the unfenced portion of the street frontage. From the facts, this seems a reasonable inference.

- I hold, therefore, that the conviction of the appellant was proper, and the appeal is dismissed with £7 7s. costs.

*Appeal dismissed.*

Solicitor for the appellant: *L. B. Inch* (Auckland).

Solicitors for the respondent: *Butler, White, and Hanna* (Auckland).

## HEATHCOTE COUNTY v. SLOAN AND ANOTHER.

SUPREME COURT. Christchurch. 1951. October 24. NORTHROFT, J.

*Land Acts—Land Subdivision in Counties—Scheme Plan showing Strip of Land marked "Road widening"—Such Land not "proposed road"—Land Subdivision in Counties Act, 1946, s. 9 (3).*

On the scheme plan of a subdivision in the Heathcote County, the sections facing the Heathcote River were separated from a public road by a strip about 12 ft. in width, marked "road widening."

On originating summons, the Court was asked to determine whether the strip of land marked "road widening" was a "proposed road" within the meaning of s. 9 (3) of the Land Subdivision in Counties Act, 1946.

*Held*, That the strip of land marked "road widening" was not a "proposed road" within the meaning of that term as used in s. 9 (3) of the Land Subdivision in Counties Act, 1946, as that term was inappropriate to describe land set aside to be an addition to an existing road.

ORIGINATING SUMMONS for the determination of the question whether a strip of land marked on a plan of a proposed subdivision as "road widening" was a "proposed road" within s. 9 (3) of the Land Subdivision in Counties Act, 1946.

The defendants desired to dedicate a strip of land in their possession under s. 9 (7) of the statute. The District Land Registrar required the plaintiff County's certificate before registering the instrument of dedication. Before it would give the certificate, the County considered that the owner, pursuant to s. 9 (3), should form the land as a road.

The subdivision in question comprised land adjacent to the Heathcote River. Between the river and the subdivided land there was a strip, 25 ft. wide, which was originally reserved as a tow-path. It was conceded that this was a public road. Although unformed, it was marked on the plan of the subdivision as "road." On the plan of the subdivision, those sections facing the river were separated from this public road by a strip marked "road widening" of about 12 ft. in width. The scheme plan of the subdivision showing this "road widening" strip was submitted to the Minister of Lands in accordance with s. 3 of the statute, and was approved by the Minister unconditionally.

*A. C. Perry*, for the plaintiffs.  
*Lascelles*, for the defendants.

NORTHCROFT, J. (orally). This originating summons calls for an interpretation of subs. 3 of s. 9 of the Land Subdivision in Counties Act, 1946. That section contains a code dealing with proposed roads shown on scheme plans for subdivision of land in counties.

[The learned Judge stated the facts, as above, and continued:] The question for determination is whether that strip of land which is marked on the plan of the proposed subdivision as "road widening" is a proposed road within s. 9 (3). That subsection is as follows:

The owner shall form and completely construct to the satisfaction of the controlling authority all proposed roads shown on the scheme plan and shall, if so required by the controlling authority, provide and lay necessary pipes for water supply and sewage and construct footpaths and drains to the satisfaction of the local authority.

I am asked to say whether this strip of land marked "road widening" is or is not a "proposed road" within that subsection. I think it is not a proposed road at all. It is a strip of land marked "road widening" and intended to be used at some time for the widening of the narrow 25 ft. public road which follows the course of the river. It is not in any sense a proposed "road," but it is land set aside to be an addition to an existing road. I think, therefore, that it is not covered by subs. 3, and the owners are not required to:

form and completely construct . . . [the whole or any part of such portion] to the satisfaction of the controlling authority . . . and . . . [to] provide and lay necessary pipes for water supply and sewage and construct footpaths and drains . . .

It may be that the Legislature should—I am not by any means satisfied that it should—have said "proposed roads or portions of roads or strips

"of land reserved for additions to roads." Instead, it has used specific language ("proposed roads") which is inappropriate to describe the piece of land in controversy here.

The question posed by the originating summons will be answered as I have indicated; defendants will have their costs, which I fix at ten guineas.

*Question answered accordingly.*

Solicitors for the plaintiffs: *Wilding, Perry, and Acland* (Christchurch).

Solicitors for the defendants: *Weston, Ward, and Lascelles* (Christchurch).

## ATTORNEY-GENERAL, *Ex relatione* FITCHETT v. LOWER HUTT CITY CORPORATION.

SUPREME COURT. Wellington. 1951. July 31; September 12.  
FAIR, A.C.J.

*Public Reserves—Land vested by Statute in Municipal Corporation "for the use, enjoyment, or recreation," of Inhabitants of Borough—Corporation's Intention to construct Public Road or Street through Such Land—Land restricted to Designated Purpose—"Use"—Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1923, s. 66.*

The purposes detailed in s. 66 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1923, which authorized the Council of the defendant Corporation to purchase certain land and stated the conditions on which it should be held, are the only purposes to which the Council can appropriate or use that land; and any discretion as to the nature of its use must be confined within the meaning of the enacting words of the section.

*The Queen v. Mayor, &c., of Wellington* ((1896) 15 N.Z.L.R. 72) followed.

The word "use" in the phrase "use, enjoyment, or recreation of the inhabitants of the borough," which is to be read in its context, is a use at least similar to, and perhaps connected with, the enjoyment in the sense of enjoyment for the purposes of recuperation, or more active recreation, of the inhabitants; and that meaning of the word does not include the use of ordinary traffic roads or the use of them for ordinary purposes of transport.

Consequently, whether the ordinary or natural meaning of the collocation of words or their meaning in statutes *in pari materia* is considered, the use of the land authorized by the final words of s. 66 (1) is restricted, and, except under special authority, it cannot be diverted from the designated purpose of "the use, enjoyment, or recreation of the inhabitants of the borough."

An injunction was accordingly issued restraining the defendant Corporation from proceeding to construct a public road or other way or thoroughfare available for public vehicular traffic through any portion of the land in question.

APPLICATION by the Attorney-General *ex relatione* Wilfred Brian Fitchett for an injunction restraining the defendant Corporation from proceeding to construct a public road or street through the land in the Lower Hutt City known as Riddiford Park. The defendant Corporation admitted that it intended to alter the existing alignment of Barraud Street and extend it southwards from its present termination to a junction with Laing's Road, and to construct a public road or street



for vehicular traffic through Riddiford Park, upon a line which would be an extension of those streets.

The plaintiff alleged that the major portion of Riddiford Park was a public reserve within the meaning of the Public Reserves, Domains, and National Parks Act, 1928, and was acquired in the year 1923 for that purpose, and had ever since been set aside and used as such; and that the balance which was previously vested in the Corporation had since been set aside and used as a public reserve. He alleged that the construction of the proposed public road or street or other way or thoroughfare for vehicular traffic through Riddiford Park, so constituting a main through traffic street intended and likely to be used for all general traffic, and likely to carry a large body of vehicular traffic of all kinds, would be in contravention of the Public Reserves, Domains, and National Parks Act, 1928, and of s. 66 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1923. Section 66 of the latter Act authorized the Corporation to purchase this land, and stated the conditions upon which it should be held.

All the allegations set out above, so far as they were pure questions of fact, had been admitted by the defendant, and the question seemed, in the opinion of the learned Judge, to resolve itself almost entirely into questions of law. At the hearing, the Corporation adduced evidence intended to establish that, when the Corporation bought the land in Riddiford Park and procured the passing of s. 66 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1923, it had no specific intention of dedicating the land as a public reserve, but had as its main object the prevention of the sale of a subdivision in small areas which might have led to the erection of unsuitable buildings and the creation of a crowded area undesirable, in the Corporation's view, in that locality. Having regard to the intention of the Corporation to add some small additional open spaces to the area, evidence was also adduced by the Corporation to show that the construction of a road for general use through Riddiford Park would occupy only a slightly greater area than the area at present occupied by the existing carriageway. This was not now, and had not been, open to general or through traffic, but had been intended to be used, and was used, by occasional vehicles going to and from buildings and on work in the Park.

A plan was submitted showing the intention of the Corporation to erect the main Public Library of the City and a learners' pool attached to the baths on a portion of this area. There were already on the area, in addition to baths, a room available to the Croquet Club, a building for Plunket Rooms, and a Dental Clinic. An area had previously been severed from the original area, under statutory authority, for the erection of a Fire Station. The Council also proposed to open the view to St. James's Church ground, so as to improve the appearance of the main open space in the Park.

The plaintiff elicited evidence intended to show that the City Council had from 1923 treated this area as a reserve intended for public enjoyment and recreation. He relied on this as showing that the area had been set aside by the defendant as a public reserve.

*Rothwell*, for the plaintiff.  
*Gillespie and Oakley*, for the defendant.

*Cur. adv. vult.*

FAIR, A.C.J. [After stating the facts, as above:] Upon the view that I take of the case, it seems unnecessary to examine these issues of fact; and, indeed, it seems doubtful whether the evidence sought to be invoked is admissible.

- 5 The question to be decided depends on the construction of s. 66 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1923, which provides as follows:

Whereas the Lower Hutt Borough Council is desirous of acquiring, for the use, enjoyment, or recreation of the inhabitants of the Borough of Lower Hutt, all that  
10 piece or parcel of land consisting of three acres and twenty-one and seven-tenths perches, which, together with Lots 1 and 2 on deposited plan No. 3804, consisting of three roods twenty-four and one-half perches, comprises all the land in certificate of title, Volume 298, folio 89, Wellington Registry: And whereas the whole of the said land is vested in the Public Trustee as trustee in the estate of one Edmond  
15 Hayes (deceased) and Patrick Casey . . . and the beneficiaries interested in the said estate have offered to sell to the Council the whole of the said land for the sum of fourteen thousand pounds: And whereas the said Lower Hutt Borough Council is desirous of acquiring the said land at or for that amount and of disposing of the said Lots 1 and 2 thereof by way of sale and of retaining the balance of the  
20 land for the purposes above expressed: Be it therefore enacted as follows:—

(1) It shall be lawful for the Council to purchase the whole of the land in certificate of title, Volume 298, folio 89, Wellington Registry, and to sell, either for cash or upon terms, Lots 1 and 2 thereof, and to apply the proceeds therefrom in or towards payment of the purchase-money of the whole of the said land, and to hold  
25 and retain the balance of the said land for the use, enjoyment, or recreation of the inhabitants of the borough.

(2) The said Council may borrow by way of special loan under the Local Bodies' Loans Act, 1913, any moneys required for the completion of the said purchase, and any steps heretofore taken for the purpose of obtaining the consent of the rate-  
30 payers of the borough to any loan for such purpose are hereby validated and declared to have been lawfully taken.

It was first argued that the words "it shall be lawful" in subs. 1 were directory, and not mandatory, and left a discretion with the Council of the Borough to dispose of the land for such purposes of the  
35 Corporation as were, in its opinion, most advantageous. The authority which appears most directly apposite to this contention is found in the decision in *The Queen v. Mayor, &c., of Wellington* (1896) 15 N.Z.L.R. 72). *Sir James Prendergast, C.J.*, says: "The words 'It shall be law-  
40 ful,' it is said, *prima facie* import a discretion; but it is said by 'Lord Cairns, in *Julius v. Bishop of Oxford* (5 App. Cas. 214, 222, 223),  
" 'There may be something in the nature of the thing empowered to  
" 'be done, something in the object for which it is to be done, some-  
" 'thing in the title of the persons for whose benefit the power is to be  
" 'exercised, which may couple the power with a duty, and make it  
45 " 'the duty of the person in whom the power is reposed to exercise  
" 'that power when called upon to do so' " (*ibid.*, 77).

The Court of Appeal, confirming the judgment of the learned Chief Justice on this point, said: "As is said in the judgment, 'It shall be  
" 'lawful' *prima facie* implies a discretion; but the circumstances  
50 " 'may show that what is in terms a power is meant to be a duty. In  
" 'the present case the Legislature is in effect regulating the disposition  
" 'of several parcels of land. This particular piece of land is intended  
" 'to be used to widen an existing street, and provision is being made  
" 'for its transfer for that purpose to the proper authority, in considera-  
55 " 'tion of that authority paying the cost of reclamation as fixed by the  
" 'Act. Although not in terms a contract, it is evidently in fact the  
" 'giving effect by the only competent body to an agreement or bargain  
" 'between the public authorities concerned' " (*ibid.*, 85). Later, the

Court refers to the Legislature creating an obligation on the Crown by the use of the words "It shall be lawful" (*ibid.*, 86).

It is true the terms of the section construed provide in its opening "It shall be lawful for the Governor to grant to the Corporation, as "and for a public street" the land defined upon the fulfilment of conditions which had been satisfied by the Corporation. But the authority is here invoked, not as deciding the purposes for which the land is to be used, but as assisting to decide in the meaning of the words "It shall be lawful."

In *31 Halsbury's Laws of England*, 2nd Ed. 530, 531, it is said :

Broadly speaking, it may be said that . . . generally in public statutes, enacting words where the thing is to be done for the public benefit or in advancement of public justice, must be taken to have a compulsory force . . . Much will depend upon the subject-matter, and it is in deciding whether a provision in a statute is imperative or permissive that the intention of Parliament has most strictly to be regarded.

From the language of the section itself, it seems to me that the powers of the Corporation are limited to the purposes specifically pointed to by its language. In this connection, the opening words, which are equivalent to a recital, are entitled to the greatest weight. They recite that, whereas the Lower Hutt Borough Council is desirous of acquiring, "for the use, enjoyment, or recreation of the inhabitants," the land in question. The recital goes on later to state :

And whereas the said Lower Hutt Borough Council is desirous of acquiring the said land . . . for the purposes above expressed.

The enacting part provides as follows :

It shall be lawful for the Council to purchase the whole of the land . . . and to hold and retain the balance of the said land [substantially the whole of Riddiford Park] for the use, enjoyment, or recreation of the inhabitants of the borough.

Looking at the purpose, the recital, and the language of this section, I think it clear that the purposes detailed in it are the only purposes to which the Council can appropriate or use the various pieces of land mentioned. Any discretion as to the nature of their use must be confined within the meaning of the enacting words of the section.

The question of law to be determined is, therefore, I think, the nature of the use of the land authorized by the final words of subs. 1 of the section.

It is first to be noted that, if, as the defendant contends, the words were intended to confer the right to use the land for any purpose, within its powers, that were advantageous or beneficial to the inhabitants, one would have expected different words to be used. Instead of the words "for the use, enjoyment, or recreation," the words "for the "general purposes of the Lower Hutt Borough," or similar words, would be more apt. It would have been sufficient to say in the recital "Whereas it is desirous of acquiring" the land, and authorize its acquisition, and leave the Municipal Corporations Act to operate to restrict the use of the portion retained to appropriate municipal purposes.

The contention of the defendant amounts to a submission that the section is to have the same meaning as if the words "enjoyment, or "recreation" were omitted. I feel that it is impossible to do that. In the first place, words are not to be deemed to be used in any statute without a purpose. In the second place, the word "use" has to be read in its context. The collocation of words seems at least to indicate some attempt to define and restrict by these words the purposes for which it may be used. The maxim *Noscitur a sociis* seems to have special

force in considering such a collocation of words, and, upon the ordinary and natural reading and meaning of the words in this connection, the use contemplated would appear to be a use at least similar to, and perhaps connected with, the enjoyment in the sense of enjoyment for purposes of recuperation, or more active recreation, of the inhabitants. It is not in accordance with the ordinary use of language to speak of the inhabitants "enjoying" the use of ordinary traffic roads; nor is the use of them for ordinary purposes of transport, even by push bicycle or by trucks or buses, considered either enjoyment or recreation, but it is considered as a quicker means of transport or travelling from place to place.

The land does not appear to fall within the definition of "public reserve" in s. 2 of the Public Reserves, Domains, and National Parks Act, 1928, or any of the preceding Acts. The latter seem to have been concerned wholly with land granted or set apart by the Crown (or, perhaps, dedicated otherwise to such uses privately or by statute). This view seems to be confirmed by the provisions of s. 10 (1) of the Public Reserves, Domains, and National Parks Act, 1928, although that Act does include lands *thereafter* acquired by a local authority.

But, although the Act itself does not appear to cover the land in question in this action, the phraseology in the Act, and in the Municipal Corporations Acts, seems to confirm the interpretation that I consider to be the natural meaning of the phrase. The clearest legislative indication of this nature is to be found in s. 161 of the Municipal Corporations Act, 1920, which provides as follows:

The Council may, subject to the provisions of this Act, let or lease any land, building, or personal property held by the Corporation or controlled by the Council as a reserve or for the purposes of any public work, or for any *special purpose* (other than the use, enjoyment, or recreation of the inhabitants), or grant any rights, easements, or privileges over the same, for, in either case, any term not exceeding twenty-one years, if the Council resolves by special order that such land, building, or personal property is not likely to be required during the proposed tenancy for the purpose for which it is held or controlled, or that the rights, easements, or privileges proposed to be granted will not interfere with the proper use of such land, building, or personal property.

This section seems to make it clear that such purposes must be regarded as special purposes, and the phrase cannot, in that context, be used to indicate a right of user for the general purposes of the Municipal Corporation.

Paragraph (e) of the definition of "public reserve" in s. 2 of the Public Reserves, Domains, and National Parks Act, 1928, as I have said, does not apply to this land, which was acquired before the passing of that Act. But it is helpful, inasmuch as it defines a public reserve for the purposes of a local authority as "land acquired . . . in any manner . . . as a public reserve." "Public reserve" is defined as "land set apart for any public purpose," and "public purpose" in its turn is defined as: "Land . . . set apart . . . for the use, benefit, or enjoyment . . . of . . . the inhabitants of any district or locality." This is an example of the use of a phrase very similar to that used in s. 66 to designate lands specifically and solely intended to be subject to all the restrictions of a public reserve, as opposed to lands available for general or other purposes.

It therefore appears that, whether the ordinary or natural meaning of the collocation of words or their meaning in statutes *in pari materia* is considered, the use of the land is restricted, and that it cannot be diverted from the designated purpose except under special authority. No such authority was referred to.

Reference may also be made to the provision with regard to land which is a public reserve set aside for parks and domains, public gardens, or recreation reserves. Section 8 of the Public Reserves and Domains Act, 1908, provided as follows :

No change shall be made in the dedication of any public reserve made or set apart for any of the purposes comprised in Class III, except by special Act in that behalf or as hereinafter provided by this Act. 5

The only provision for selling such land or permanently diverting it to other uses appears to be contained in s. 12, which provides for an exchange for other land which the Governor deems of equal value therewith and *more suitable* for the purposes of a reserve. 10

I doubt whether s. 25 of the Public Works Act, 1928, applies to this land, as it does not appear to be a public reserve as defined in s. 2 of that Act.

In view of the opinion I have arrived at as to the meaning of s. 66, 15 it is unnecessary for me to consider the arguments as to whether the words in the phrase should be read disjunctively or conjunctively, and whether the word "or" is equivalent to the word "and." It is to be noted that it frequently is equivalent to the word "and," and that in this context it would probably approximate to the conjunctive meaning. 20 The terms of s. 157 of the Municipal Corporations Act, 1920, seem, when collated with s. 161, to indicate that the word "or" there approximates in meaning to "and." The nature of the provision clearly indicates use for special purposes. But it is unnecessary to decide this. 25

With reference to the suggestion that the amount of land taken out of active use as a recreation area, in the sense of not being a park road-way, is small, it appears to me that this argument cannot be accepted as of weight, having regard to the fact that the large amount of through traffic which would use the street would change the nature of the road-way (which, in its present form, is not a public street) from that of a little-used open space in the Park to a busy traffic street. Moreover, if the Council had power to alienate any portion other than an entirely negligible portion, it would be impossible to determine the limits of such rights of alienation short of such as would destroy its essential nature as a park. 30 35

I should add, too, perhaps, that, in my view, the evidence showed that the Council did in 1923, and for many years afterwards—perhaps until the present year—treat this area as a recreation reserve, but that treatment or the original intention of the Council has, I think, no bearing, 40 except in so far as it might assist in construing ambiguous words. As I do not consider the phrase ambiguous, this evidence, and the purposes for which it was stated to the ratepayers that a loan was being raised, are irrelevant.

The only reasonable conclusion which can be drawn from all these 45 considerations is that the Court is bound to interpret this phrase as used by the Legislature to appropriate or " earmark " this area for purposes similar to those of a public reserve. It is, I think, land of the type referred to in para. (h) of the definition of " public reserve " in s. 2 of the Public Reserves, Domains, and National Parks Act, 1928, 50 as acquired subject to a trust or a condition that it shall be held by the local authority as a reserve. Although in the English Acts the words " enjoyment or recreation," or similar words, are used, without the inclusion of the word " use " it would appear that the phrase has been used in the New Zealand statutes to convey the same meaning as in 55

those Acts. The latter are considered in the cases summarized in 36 *English and Empire Digest*, 251. The word "use" may well have been included in order to prevent any question arising (such as has arisen in many English cases) as to the power to erect buildings which, although not directly incidental to recreation, may be considered suitable for association with them, or which were under the old law on the border-line. Museums and art galleries have been considered to fall within the words "enjoyment or recreation," and so has the erection of a library. But it may possibly be that the library there referred to was one that was used primarily for the persons who were resorting to the reserves, and who would use it largely as a reading-room. Whether or not it would apply to a lending library may be a matter of doubt.

There are buildings, such as the Plunket Rooms and the Dental Clinic, on this area which might not be within the purpose of lands appropriated for "enjoyment or recreation," but which might perhaps be covered by the word "use." However, I do not intend to give any ruling on these matters. I refer to them to illustrate possible reasons for which the draftsman might have thought it wise to include in the various Acts and in this section the word "use." It appears to me quite clear that the section does not authorize the appropriation of any part of this land for the purposes of a public street which is to be used mainly—perhaps almost entirely—for the purpose of ordinary through traffic. It may be very desirable, but, as there is no authority in law so to use it, its diversion to this purpose is *ultra vires* the Council.

It was finally submitted that an injunction should not be granted at this stage, as no active steps have been taken to lay out a public street on this area. But, in view of the Council's admission that it intended to lay out such a public street if it had power, the present is the most suitable time for the question to be brought before the Court and for the Court to declare what the powers and duties of the Council are at the present time. If the Council later obtains lawful authority to construct a public road over this area, it may be that it will be obtained subject to special conditions. In these circumstances, it seems to me that the proper course is to issue an injunction restraining the defendant Corporation from proceeding to construct a public road or other way or thoroughfare available for public vehicular traffic through any portion of the land in Certificate of Title Vol. 517 Folio 287 until further order of the Court; and an order will be made accordingly.

The relator, having succeeded in his action, is entitled to costs, and, unless the parties can agree as to these, I will hear them upon the matter at a later date.

*Order accordingly.*

Solicitors for the plaintiff: *Rothwell, Gibson, Page, and Marshall* (Lower Hutt).

Solicitors for the defendant: *Hogg, Gillespie, Carter, and Oakley* (Lower Hutt).

IN THE COURT OF APPEAL.]

NEW ZEALAND BREWERIES, LIMITED v.  
AUCKLAND CITY CORPORATION.COURT OF APPEAL. Wellington. 1951. September 25, 26; December 17.  
STANTON, J.; HAY, J.; F. B. ADAMS, J.*Rates and Rating—Water Rates—Ordinary Supply of Water—Hotel Premises within meaning of "dwellinghouse"—Municipal Corporations Act, 1933, s. 82 (7).*

In general, a licensed hotel is a "dwellinghouse" within the meaning of that term as used in the context of s. 82 (7) of the Municipal Corporations Act, 1933, which relates to ordinary supply of water; and, accordingly, the appellant company (the owner of the Naval and Family Hotel, Auckland, in which the occupation for actual living purposes was far from nominal) was not entitled to the benefit of that subsection.

*Vaile and Sons, Ltd. v. Mayor, &c., of Auckland* ([1931] N.Z.L.R. 769) applied.

So held by the Court of Appeal, for the following reasons:

Per *Stanton, J.*, 1. That, as s. 76 of the Licensing Act, 1908, requires that an hotel must have at least six rooms to provide accommodation for the travelling public, and as it is implied in that statute that the licensee himself must also reside there, it can be assumed that the provision and continued availability of living accommodation are a substantial part of the functions of every hotel in a borough.

*Fox v. Lewis* ([1925] G.L.R. 198) referred to.

2. That, as the charge for ordinary supply only is dealt with in s. 82 (7) of the Municipal Corporations Act, 1933, and is intended to apply to the supply of water for domestic purposes where living accommodation is a substantial purpose—not necessarily the dominant purpose—then an hotel building comes into the class of "dwellinghouse," and not into the class of "other building," in that subsection.

3. That, in relation to the hotel in question, the following facts are sufficient to show that the dwelling of people in it is a substantial purpose of its existence, and that it is, therefore, a "dwellinghouse"—namely, that a bar is the predominant producer of revenue, and such revenue could not be obtained were it not for the existence and maintenance of the living accommodation; that the latter is at least equal in area to the portion required for the bar trade; and that there may be eleven or more persons in residence at any time or all the time.

*River Wear Commissioners v. Adamson* ((1877) 2 App. Cas. 743) referred to.

*Quære*, Whether, in view of ss. 76 and 165 of the Licensing Act, 1908, and s. 58 of the Licensing Amendment Act, 1948, licensed hotels are to be considered as requiring to be differentiated, for the purposes of s. 82 of the Municipal Corporations Act, 1933, and an hotel which has a very small bar in relation to the extent of its living accommodation is to be regarded as a "dwellinghouse" and another hotel with a large bar in relation to the extent of its residential accommodation is to be regarded as an "other building"; and, if so, on what basis is the distinction to be founded: area, value, gross revenue, net profit, or otherwise?

Per *Hay and F. B. Adams, JJ.*, That, apart from extreme cases (as where there is only a caretaker in residence), a building in which people live is a "dwellinghouse" within the definition adopted by the Court of Appeal in *Vaile and Sons, Ltd. v. Mayor, &c., of Auckland* ([1931] N.Z.L.R. 769) in respect of s. 83 of the Municipal Corporations Act, 1933; and that an ordinary licensed hotel such as the one in question is such a building; and that that result may properly be applied to s. 82 on the presumption that the word is used with the same meaning in the two sections.

*Inland Revenue Commissioners v. Herbert* ([1913] A.C. 326), *Watson v. Haggitt* (1927) N.Z.P.C.C. 474, and *Spencer v. Metropolitan Board of Works* (1882) 22 Ch.D. 142 followed.

*Epsom Grand Stand Association, Ltd. v. Clarke* ((1919) 35 T.L.R. 525) applied.

*Rolls v. Miller* (1884) 53 L.J.Ch. 682 and *In re Marshall and Scott's Contract* ([1938] V.L.R. 98) distinguished.

Judgment of *Finlay, J.* ((1951) 8 N.Z.L.G.R. 46), affirmed.

APPEAL from the judgment of *Finlay, J.* ((1951) 8 N.Z.L.G.R. 46), where the facts are fully set out.

*Watson*, for the appellant. The question for determination is whether the Naval and Family Hotel in Auckland is to be deemed a "dwellinghouse" or business premises for the purposes of s. 82 of the Municipal Corporations Act, 1933. The hotel has eleven bedrooms, six available to the travelling public. The other bedrooms are available to the manager and his wife and to the resident hotel staff.

On the facts, there is no tenancy of any kind between the appellant and the manager, who, with his wife, are simply the employees of the appellant to manage and conduct the hotel business, with a right to board and lodging. At least 90 per cent. of the business revenue is derived from the sale of liquor.

Summarized, the effect of s. 82 of the Municipal Corporations Act, 1933, is that (a) the section gives the Council power to make water rates; (b) the section divides water supply into two classes ("ordinary" and "extraordinary"), but it does not define either; (c) the section leaves it to each local authority to make its own definition by by-laws as to what is ordinary supply and what is extraordinary supply; (d) the section prescribes certain maximum limits of rating in respect of ordinary supply, but imposes no such maximum limits in respect of extraordinary supply; (e) the section provides that, in respect of ordinary supply, the rate for buildings other than dwellinghouses is to be half the rate in respect of dwellinghouses. Business premises would consume more water than a dwellinghouse would. It is a little difficult to say why the Legislature has provided for a half-rate in respect of buildings other than dwellinghouses, but the reason is not based upon any consideration of the quantity of water consumed. Many buildings other than dwellinghouses use very large quantities of water—e.g., laundries, aerated-water factories, scouring-works, &c. If speculation is permissible, probably the only reason that can be suggested is that in general the annual value, or the unimproved value, of a dwellinghouse is small when compared with the annual value, or the unimproved value, of business premises.

The whole question before the Court, as before the Court below, is the very narrow point whether this particular hotel is a "dwelling-house" or is a "building (other than a dwellinghouse)." Subsection 7 has been incorporated in part in the Auckland City By-laws. For rating purposes generally, this hotel, in common with all other licensed hotels, is treated as business premises. The Auckland rating is on the annual value, and, for the purposes of arriving at the value of this hotel, the Council treats it as business premises. In fixing the annual value, it takes into account the enhancement due to the existence of the publican's licence attached to the premises: *Dunedin City Corporation v. Hames* ((1947) 6 N.Z.L.G.R. 341). In following that judgment,



the Auckland City Council has treated this hotel as business premises with a high annual value because of the existence of a licence to carry on a publican's business on the premises. The supply of water to the premises is treated as an "extraordinary" supply, and not as a domestic supply. For two major purposes—namely, for the foundation of its rating scheme, and for the purposes of water supply—the Council has itself treated the premises as premises "other than a dwellinghouse." Only for the purposes of the by-law dealing with a minimum charge, for which it invokes s. 82 (7), it seeks to say that the hotel is a dwellinghouse. This has the effect of doubling the minimum rate it has to pay. If there is ambiguity as to whether this is a dwellinghouse or business premises and two possible meanings are open to the Court, then, this being in effect a taxing statute, the interpretation most favourable to the taxpayer should be adopted, particularly when that interpretation has been adopted by the Council (the taxing authority) for other purposes: *Maxwell on The Interpretation of Statutes*, 9th Ed. 291, 292, *South Staffordshire Waterworks Co. v. Barrow* ((1897) 13 T.L.R. 549), *Pryce v. Monmouthshire Canal and Railway Companies* ((1879) 4 App. Cas. 197, 205), and *Stockton and Darlington Railway v. Barrett* ((1844) 11 Cl. & F. 590, 601, 602, 603, 606, 607, 608; 5 E.R. 1225, 1230, 1232). The rule applies to a ratepayer or a payer of tolls. The passage in *31 Halsbury's Laws of England*, 2nd Ed. 520, para. 710, is not justified by the cases cited in the text. On the foregoing argument—namely, that the principle of construction of taxation legislation applies in this case—the Court must hold, on the interpretation in the taxpayer's favour, that the hotel is business premises, and not a "dwellinghouse." That principle is not adverted to in the judgment of the Court below. Apart from the general principle referred to, the principle of interpretation as stated by the learned Judge is adopted ((1951) 8 N.Z.L.G.R. 46, 50). Thus, taking the statute as it stands, and construing its words according to their ordinary and natural meaning, the premises could not be referred to or considered as a "dwellinghouse." A brewery company such as the appellant could not be said to have taken a lease of this or that dwellinghouse with an annual rating value in excess of £5,000. The manager of the hotel is only an agent to carry on a business. The appellant does not occupy the premises as a "dwellinghouse." The fact that there may be lodgers is not sufficient to convert the premises into a dwellinghouse, as few members of the public stay at the hotel, and it is not the dwellinghouse of those who do stay there. The essence of a dwellinghouse is the degree of permanence in a dwelling, coupled with the right of exclusive and unrestricted occupation and freedom to use it as one's own home. The provision of lodging facilities is part of a hotelkeeper's business, making it inappropriate to describe as a dwellinghouse the premises wherein a dual business is carried on. In commercial usage, it would be a complete misnomer so to describe it. The existence of a licensed hotel in New Zealand depends upon the Licensing Act, 1908. It therefore becomes helpful, at least, to see how the Legislature has described in that Act a type of premises that is the foundation of their existence. The Act refers to the business of the premises or the business of a publican. [Refers to ss. 125, 126, 130, 132, 138, and 159.] Section 59 (5) of the Statutes Amendment Act, 1939, draws a distinction between a dwellinghouse and licensed premises; and see the Municipal Corporations Act, 1933, s. 306 (11). Under the Tenancy Act, 1948, s. 1 (2), licensed premises are expressly excluded. As His Honour has pointed out ((1951) 8 N.Z.L.G.R. 46, 50), little or no

help is to be had from ascertaining how the word in different contexts in different statutes has been interpreted. In the Court below, two main classes of cases were cited, one being a group of cases arising from the charge for water supplied in England. Those cases are of no help in this case, because the charges in England are all based on the purpose for which the water was supplied, and are not based upon the nature of the building. A few were cases under the Rent Restriction Acts both here and in England. In some, licensed premises have been held to be "dwellinghouses," but in those cases an Act was being applied which showed a definite intention to protect tenants' living quarters, and all were cases in which the hotel had been let to a tenant and he resided in it as his home. In each, the Court was construing benevolent legislation for the protection of tenants, to ensure they retained a home without suffering an increase in rates. The reasoning of the learned Judge in the concluding portion of his judgment ((1951) 8 N.Z.L.G.R. 46, 54) is based upon the fallacy that the supply of water to the hotel is a supply for domestic purposes, and that, therefore, the hotel must be a dwellinghouse, when, in fact, it is an extraordinary supply. An ordinary supply is not necessarily a domestic supply. The crucial words are "Viewed in this light" (*ibid.*, 54) and "Judged by that standard" (*ibid.*, 54). No such intention can be attributed to the Legislature. His Honour is not justified in reading into s. 82 any intention to define "ordinary" or "extraordinary" supply. An extraordinary supply is given to this hotel. The Legislature leaves it to the local authority to define by by-law what is an ordinary and what is an extraordinary supply, and, under the by-law, the water supplied to the hotel is an extraordinary supply. Subsection 7 operates to the extent that the Council has imported it into its by-law.

A. L. Martin, in support. The following cases contain certain observations as to the general or common meaning of the word "dwellinghouse": *Re Norris, Ex parte Reynolds* ((1888) 4 T.L.R. 452), *In re Erskine, Ex parte Erskine* ((1893) 10 T.L.R. 32), *Macdougall v. Paterson* ((1851) 11 C.B. 755, 769; 138 E.R. 672, 678), *Brown v. Ocean Accident and Guarantee Corporation, Ltd.* ([1916] N.Z.L.R. 377, 382), *In re Marshall and Scott's Contract* ([1938] V.L.R. 98, 99), *Macmillan and Co., Ltd. v. Rees* ([1946] 1 All E.R. 675, 677), *Carritt v. Godson and Son* ([1899] 2 Q.B. 193, 196, 197), *Kirkpatrick v. Maxwelltown Town Council* ((1911) 14 S.C. (Ct. of Sess.) 288, 297), *Blakey v. Brennan* ([1944] N.Z.L.R. 929), *Wood v. Barber* ([1946] N.Z.L.R. 323, 329), and *London County Council v. Davis* ((1897) 77 L.T. 693).

H. J. Butler, for the respondent. The judgment can be supported, not only on the grounds stated by the learned Judge, but also on the grounds which were argued in the Court below and were rejected by him. The word "dwellinghouse" must receive its ordinary and popular meaning; and, when considered in the light of the context and subject-matter, it has a much wider meaning than the appellant contends, and comprehends any building used for human habitation. A boarding-house, apartment house, residential club, or licensed or unlicensed hotel is as much a "dwellinghouse" for the purpose of the Municipal Corporations Act, 1933, as is a private residence.

As to the principles of construction relevant to this inquiry: In all cases where a statute is to be construed, the object is to ascertain the intention expressed by the words used. That can be achieved only

by a consideration of the circumstances with reference to which the words were used: *River Wear Commissioners v. Adamson* (1877) 2 App. Cas. 743, 763), *Eastman Photographic Materials Co., Ltd. v. Comptroller-General of Patents, Designs, and Trade-marks* ([1898] A.C. 571, 576), *O'Grady v. Wilmot* ([1916] 2 A.C. 231, 259), and *Seaford Court Estates, Ltd. v. Asher* ([1949] 2 K.B. 481, 498, 499; [1949] 2 All E.R. 155, 164; aff. on app., [1950] A.C. 508, 530; [1950] 1 All E.R. 1018, 1029, 1030). The same rule is expressed in New Zealand in s. 5 (j) of the Acts Interpretation Act, 1924; and see, also, *Inland Revenue Commissioners v. Herbert* ([1913] A.C. 326, 332).

Sections 82-86 of the Municipal Corporations Act, 1933, form a code for the purpose of making and levying water rates. The question of "ordinary" supply is dealt with in s. 82. In Auckland, the annual-value system of rating is in operation. The full rate is payable in respect of lands and dwellinghouses to which water is supplied: subs. 4. Under subs. 7, only half the rate is payable in respect of ordinary supply to "buildings (other than dwellinghouses)." No distinction is there made between dwellinghouses and other buildings.

As to the general effect of ss. 82 and 83: In respect of ordinary supply, the rates in general bear no relation to the quantity of water supplied or consumed, the rate being based on annual value alone. Nevertheless, relief is given in two cases—namely, (a) where no water is supplied at all, although it could be supplied under subs. 8, and (b) where the dwellinghouse or other building is unoccupied over a period in excess of six months. The reason for the relief is that, in the first case, no water will be consumed at all, and, in the second case, the consumption of water will be considerably less than normal. It is for similar reasons that different rates are provided for a dwellinghouse, on the one hand, and a building other than a dwellinghouse, on the other, because a building used for human habitation will normally require more water for ordinary supply than a building not so used.

In the Court below, it was argued for the appellant that the reason for the distinction was that a building other than a dwellinghouse would normally have a higher rating value, and should be charged a lower water rate on that account. That argument will not bear close examination, because, where no water is supplied, the case comes within subs. 8; the dwellinghouse and the building other than a dwellinghouse are treated in exactly the same way. That argument would have little force in cases where the local authority decides (as it is entitled to do) to charge a graduated rate under s. 82 (6), and not the uniform rate, because the graduated rate would take care of the difference in valuation.

The term "dwellinghouse" should be construed in such a way as to give effect to the intention of the Legislature; to restrict its meaning to a private dwelling would be to defeat, rather than to give effect to, the intention of the Legislature. What may be called public dwellings—apartment houses, licensed premises, &c.—would use just as much water for ordinary purposes as a private residence would, and yet the appellant's interpretation of the word "dwellinghouse" would exclude all of them. There may be dwellinghouses where a business is carried on, and there may be buildings other than dwellings where no business is carried on. The only reason that can properly be found for that distinction is that a dwellinghouse will use more water than a building other than a dwellinghouse.

- The same result follows a consideration of the legislation. The present system of rating had its origin in s. 35 of the Municipal Corporations Waterworks Act, 1872. Although the terminology has somewhat changed, the system is still basically the same. Before the enactment of that Act, the levying of water rates was dealt with in s. 20 of the Municipal Corporations Amendment Act, 1871. That was the first occasion where provision was made for the levying of water rates as such. Those ratepayers who were liable were called upon to pay whether they received any water or not, and irrespective of the quantity of water they received. The Municipal Corporations Waterworks Act, 1872, s. 35, provided at least a partial remedy when it enacted that only those ratepayers who were, or could be, supplied, should pay water rates, and that the rates payable should bear some relation to the quantity of water likely to be consumed—i.e., by differentiating between dwellinghouses and other buildings. That interpretation would be consistent with the smooth working of the system: *Shannon Realities, Ltd. v. Ville de St. Michel* ([1924] A.C. 185, 192). Where a word is used in a statute, the same meaning must, if possible, be given throughout: *Maxwell on The Interpretation of Statutes*, 9th Ed. 323, and *Spencer v. Metropolitan Board of Works* ((1882) 22 Ch.D. 142, 162). The Legislature was careful to limit the meaning of the word "dwelling-house" in s. 82 (4). There is a clear indication that the word "dwellinghouse" is capable of meaning a licensed hotel; otherwise, there would be no need whatever to make an express exception (see s. 306 (11)). In the argument for the appellant, reference was made to a rule of construction that a rating statute should be strictly construed as against the local authority, and to certain authorities in England. In effect, the appellant is seeking to claim an exemption by bringing himself within subs. 7 and qualifying for the half-rate: *Mayor, &c., of Dunedin v. Baird* ((1913) 33 N.Z.L.R. 149, 153). In effect, the appellant is claiming partial exemption, the result of which would be to throw the burden on other ratepayers. Authorities referred to by the appellant are English authorities, where there is no statutory counterpart of our s. 5 (j) of the Acts Interpretation Act, 1924: *Hutton v. Hutton* ((1910) 13 G.L.R. 201).

The word "dwellinghouse" in s. 82 of the Municipal Corporations Act, 1933, means a house or building used for human habitation, and, as such, comprehends both private and public houses. The authorities referred to are illustrations of the wide meaning which, in an appropriate context, may be given to the word "dwellinghouse," and were referred to for that purpose only: *Vaile and Sons, Ltd. v. Mayor, &c., of Auckland* ([1931] N.Z.L.R. 769, 778) and *Lewin v. End* ([1906] A.C. 299, 302, 304).

- As to *Vaile and Sons, Ltd. v. Mayor, &c., of Auckland* ([1931] N.Z.L.R. 769): (a) The Court of Appeal defined the meaning of the word "dwellinghouse" as used in s. 69 of the Rating Act, 1925. That statute is *in pari materia* with the Municipal Corporations Act, 1933. (b) The Court, without the material that is here available, gave a broad meaning to the word "dwellinghouse" as a house in which people actually live or which is physically capable of being used for human habitation. (c) While the Court held that the words "or other building" were to be construed *ejusdem generis* with the word "dwellinghouse" in s. 69 of the Rating Act, 1925, it does not necessarily follow that those same words appearing in s. 83 of the Municipal Corporations Act, 1933, should also be construed *ejusdem generis*. It may be that that principle would not apply to s. 83.

As to the cases dealt with in the judgment: *Epsom Grand Stand Association, Ltd. v. Clarke* ((1919) 35 T.L.R. 525, 526) was followed in *Ellen v. Goldstein* ((1920) 89 L.J.Ch. 536) and approved in *Burns v. Radcliffe* ([1923] 2 I.R. 158) and *Vickery v. Martin* ([1944] 2 All E.R. 167); and see *Meek v. Horlock* ([1946] N.Z.L.R. 502, 503), and *Re Ross and Leicester Corporation* ((1932) 96 J.P. 459); but *Rolls v. Miller* ((1884) 53 L.J.Ch. 682, 684, 685) is distinguishable. The English cases are not very helpful, as, in the main, they deal with the use of water, and not with the nature or type of building supplied, but in certain of the statutes one finds the words "the owners or occupiers of dwelling-houses may demand water for domestic purposes," and so it became necessary to consider the meaning of the word "dwellinghouse" in that context. *South-West Suburban Water Co. v. St. Marylebone Union* ([1904] 2 K.B. 175) and *Liskeard Union v. Liskeard Waterworks Co.* ((1881) 7 Q.B.D. 505). Those cases show that, while the word "dwellinghouse" is capable of meaning a building or house used for human habitation, it is capable of meaning a licensed hotel; and in some of the cases the learned Judges have had very little difficulty in coming to that conclusion.

The appellant argues that, because the value of the licence is included in the annual value, the premises are thereby treated as business premises. That does not make the premises any the less a "dwellinghouse." The Council is obliged, on the authority of *Dunedin City Corporation v. Hames* ((1947) 6 N.Z.L.G.R. 341, 361), to take the value of the licence into consideration in fixing the annual value. A similar argument was advanced in England, but unsuccessfully, with regard to the supply of water to licensed hotels where the rating is on annual value, as in Auckland: *West Middlesex Waterworks Co. v. Coleman* ((1885) 14 Q.B.D. 529). The purpose of the by-law making power is to enable the local authority to determine the maximum quantity of water that will be covered by the rate. That maximum could be fixed either on a gallonage basis or (as here) by defining the nature of the user; and, although the maximum has been fixed, the supply is still called an "ordinary supply," which, as the learned Judge says ((1951) 8 N.Z.L.G.R. 46, 54), connotes the normal purposes for which water is required in the ordinary course of living. A building in which people live will require water for the ordinary purposes of living, and the occupier is accordingly charged the full rate. Other buildings will not normally require water for such purposes of living, and so a half-rate is charged. The test to be applied is whether the building is used for human habitation. It is a question of fact in every case. Here, at least half the floor area of the appellant's building is given up for residential purposes. Four people reside there permanently. Section 76 of the Licensing Act, 1908, requires at least six rooms for public accommodation. The fact that the licensee does not encourage permanent guests is immaterial, as is also the fact that 90 per cent. of the revenue is derived from the sale of liquor. This is a building not only used, but designed for use, for human habitation, and, as such, it is a "dwellinghouse" within the meaning of that word as used in s. 82 of the Municipal Corporations Act, 1933. Accordingly, this appeal should be dismissed.

*Watson*, in reply. Respondent's counsel has not sought to support the judgment in the Court below on the ground taken by the learned Judge, and throughout his argument he has not attacked the principle of construction upon which the learned Judge acted—namely, the

- principle laid down in *Inland Revenue Commissioners v. Herbert* ([1913] A.C. 326, 332). Neither has he attacked the submission that this is a taxing statute, and that, if there are two meanings possible to a word in a taxing statute, then the meaning most favourable to the taxpayer must be adopted. He argued that it was the intention that dwellings were to pay a higher rate, because they used more water. That is not supported by the evidence, and a speculation of that kind is not permissible. In any case, respondent's speculation, as well as being inadmissible, is wrong, because there are many businesses or trades which use far greater quantities of water than does any dwelling-house. The word "dwellinghouse" must be construed in its ordinary sense, and, if there is more than one possible interpretation, that interpretation must be adopted which is most favourable to the taxpayer. He says, first, that the respondent is asking for an exemption from taxation which will increase the burden of other taxpayers, and, secondly, that the application of that doctrine would interfere with the smooth working of a system. The appellant, however, is seeking no exemption, but is merely seeking to be put in one of two classes—namely, in the class which pays a half-rate in respect of a building other than a dwellinghouse, as provided for in s. 82 of the Municipal Corporations Act, 1933. There is no evidence to justify, and no reasoning to support, his second contention. The mere placing of the appellant in its proper category as a ratepayer could hardly be said to interfere with the smooth running of the rating system in Auckland. It is not necessary for this Court to embark on an examination of the difficulties created by the by-law, or to make an exhaustive definition of "dwellinghouse." All the originating summons asks is: "Is the Naval and Family Hotel, Auckland, a dwellinghouse, or a building (other than a dwellinghouse), for the purposes of s. 82 of the Municipal Corporations Act, 1933?"
- 30 In *Vaile and Sons, Ltd. v. Mayor, &c., of Auckland* ([1931] N.Z.L.R. 779) and in *Lewin v. End* ([1906] A.C. 299), the buildings were let as dwellings, and each tenant lived there. Here, the tenancy is not a tenancy for dwelling purposes. The tenant is New Zealand Breweries, Ltd., so that it is obviously a tenancy for business purposes.

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*Cur. adv. vult.*

STANTON, J. This is an appeal from the judgment of *Finlay, J.* ((1951) 8 N.Z.L.G.R. 46), on an originating summons in which the following question was asked:

- 40 Is the Naval and Family Hotel, Auckland, a dwellinghouse, or a building (other than a dwellinghouse), for the purposes of s. 82 of the Municipal Corporations Act, 1933?

The learned Judge answered that question as follows: "the Naval and Family Hotel at Auckland is a dwellinghouse for the purposes of s. 82 of the Municipal Corporations Act, 1933" (*ibid.*, 54).

- 45 The hotel in question is one of the smaller hotels in the City of Auckland, and comprises a basement, ground floor, and two upper floors. The basement and ground floor are fitted and used for the storage and sale of intoxicating liquors and contain conveniences for the use of the public. The two upper floors are fitted and furnished for use for residential purposes. The first floor comprises kitchen, bathroom and conveniences, dining-room, sitting-room, staff room, two bedrooms, and another room which could be used as a bedroom. The second floor comprises a sitting-room, bathroom and conveniences, and nine bedrooms. Of the bedrooms, several are occupied by the licensee and his family
- 50

and by employees, leaving one double bedroom and five single ones available for use by the travelling public. The hotel has a large bar trade, and more than 90 per cent. of the total revenue from the hotel comes from the sale of intoxicating liquors. The appellant company is the lessee of the property, and the licensee conducts the hotel as the manager and servant of the company. It is said that, in assessing the annual value of the property under the provisions of the Rating Act, 1925, the respondent Corporation takes into account any enhancement in value due to the existence of the licence. Information was given as to the quantity of water used in the hotel, with an estimation of the quantities used for different purposes, and it appeared that the hotel actually received, not an ordinary, but an extraordinary, supply of water. None of these matters, however, can help us in considering the question asked in the originating summons.

The answer to the question asked depends on the interpretation to be placed on the word "dwellinghouse" in s. 82 of the Municipal Corporations Act, 1933. That section deals with water rates; it provides for these being charged as for "ordinary supply," "extraordinary supply," and "meter supply." It does not define the terms used, but authorizes borough councils to make by-laws defining "ordinary supply" and "extraordinary supply." It contains no limitation as to the rates that may be charged for extraordinary supply or for a supply by meter, but it contains extensive provisions regulating the maximum rates for ordinary supply. The particular feature with which we are here concerned is that these maximum rates for an ordinary supply relate, so far as buildings are concerned, to dwellings, and the rates vary, not according to the size of the dwelling or the quantity of water which may be expected to be used therein, but according to the annual values of the respective properties. Where, as here, the Council adopts a uniform scale, the maximum annual rate for dwellings of a greater annual value than £12 10s. is 6 per cent. of the annual value, with a minimum of 10s. Subsection 7 then makes provision for other buildings, and provides as follows:

In respect of the ordinary supply to buildings (other than dwellinghouses) to which water is supplied the rates shall not exceed one-half of the rates specified in subsection five or subsection six hereof as the case may be.

It will be seen that the section divides buildings into two classes—namely, (i) "dwellinghouses," and (ii) "other than dwellinghouses"—so that, in respect of each building, it has to be decided whether or not it is a dwellinghouse, and, if it is not a dwellinghouse, the charge for an ordinary supply must not exceed one-half of that for a dwellinghouse. A good deal of discussion took place as to the reason for this division and distinction, and Mr. Butler called attention to s. 83, which provides for a concession of one-half rates for dwellinghouses which are vacant for more than six months in any year, and, in accordance with the decision of this Court in *Vaile and Sons, Ltd. v. Mayor, &c., of Auckland* ([1931] N.Z.L.R. 769), the same concession is not available for buildings which are not dwellinghouses. Mr. Butler suggests that this indicates an assumption that, in relation to "ordinary supply," the quantity of water consumed in premises where people dwell would be greater than in premises of a similar value where people did not dwell. Mr. Watson thinks this is mere speculation which is neither permissible nor helpful. However that may be, the fact remains that the Legislature has made the distinction, and has based it upon the designation of the full-rate class as comprising all dwellinghouses, and, whatever else this word



- may signify, it must connote the idea of buildings for persons to live in. If in fact buildings could be divided into two classes, comprising, on the one hand, those in which people dwell, and, on the other hand, those in which nobody dwells, then obviously the first class would comprise the
- 5 dwellings referred to in the section and the second class the other buildings. I think this result would follow whatever the nature of the "dwelling" occupation of the buildings in the first class, whether, for instance, they were private dwellings housing only a single family, or boarding-houses (some of which are called private hotels) housing a larger
- 10 or smaller number of permanent or temporary guests, or rooming or apartment houses, private hospitals, or blocks of residential flats. If it cannot be said that the premises are used for any purpose except for people to live in, then they must, I think, be classed as "dwellinghouses" within the meaning of that word in this section. But in present con-
- 15 ditions there are many buildings which are used both for dwelling and for other purposes, and the dwelling portion may vary, from cases in which it is a wholly insignificant detail to those in which it is the dominant and principal purpose of the building. In such cases, it may some-
- 20 times be difficult to say whether the building should properly be classed as a dwellinghouse or as another building. In *Mayor, &c., of Auckland v. Hawthorne* ([1929] G.L.R. 101)—a decision which was referred to with approval in *Vaile's* case ([1931] N.Z.L.R. 769, 778)—*Blair, J.*, said, referring to combined shops and dwellings: "I can conceive a case
- 25 "where the dwelling portion of the building—such for instance as the caretaker's living rooms in a large shop—are such an insignificant "portion of the premises as altogether to take it out of the category "of dwellinghouse. But here the dwelling portion is the major portion "from the area point of view and the premises are substantially dwellings "with shop attached. Many a tradesman has his home in front of his
- 30 "premises and a workshop at the backyard. In my opinion if the "premises are substantially dwellings, the fact that they also comprise "a shop will not take them out of the category of premises entitled to "the exemption or refund provided by the section" ([1929] G.L.R. 101, 102).
- 35 All licensed hotels in the City of Auckland necessarily fall into the category of dual purpose premises—that is, premises in which persons dwell and in which there is also carried on the business of selling intoxicating liquors—and the relative importance of the two functions differs widely in respect of different hotels. Some contain residential accommo-
- 40 dation which in area is many times greater than that occupied by the bar and its appurtenances, and these are only slightly differentiated from private hotels. Others, such as that in question here, reduce their residential accommodation and turnover to the minimum and subsist very largely on the profits from the bar. There is, however,
- 45 an important statutory provision in s. 76 of the Licensing Act, 1908, to the effect that no publican's licence shall be granted in respect of any house in a borough unless such house contains for public accommodation not less than six rooms besides the rooms occupied by the family of the applicant. Section 165 of the same Act makes it an offence for any
- 50 licensee to fail or refuse, except for some valid reason, to supply lodging, meals, or accommodation to travellers. This section was considered in *Fox v. Lewis* ([1925] G.L.R. 198), and it was there said by *MacGregor, J.*, that it embodied the common-law rule that an innkeeper is bound to receive and lodge in his inn all comers who are travellers, and to



entertain them at reasonable prices, unless he has some reasonable ground for refusal.

We have, therefore, the position that an hotel must have at least six rooms to provide accommodation for travellers, and it would seem implicit in the Act that the licensee himself must also reside there, from which it may be assumed that the Legislature regards the provision and continued availability of living accommodation to be a substantial part of the functions of every hotel in a borough, and, while the statutory minimum is six rooms, a licensing committee can refuse to issue a licence unless such additional accommodation is provided as the committee thinks necessary: see s. 58 of the Licensing Amendment Act, 1948. An interesting question arises as to whether hotels which are subject to the provisions of the Licensing Acts above-mentioned are to be considered as requiring to be differentiated, and whether hotels such as the Grand, in Auckland, which has a very small bar in relation to the extent of its living accommodation, are to be regarded as dwellinghouses and other hotels with large bars—and, consequently, a large bar trade—in relation to the extent of their residential accommodation are to be regarded as other buildings; and, if so, on what basis is the distinction to be founded—area, value, gross revenue, net profit, or what?

I think the key to the interpretation of the section is to be found in the fact that only the charge for ordinary supply is being dealt with, and that, however that term is defined, it is intended to apply to the supply of water for domestic purposes, the washing of dishes, clothes, and floors, drinking, preparing and cooking food, personal ablutions, water-closets, and like matters, and, where living accommodation is a substantial purpose—not necessarily the dominant purpose, however that is to be determined—then the building comes into the class of dwellinghouse, and not into the class of other building.

In the present case, although the bar is the predominant producer of revenue, that revenue could not be obtained at all were it not for the existence and maintenance of the living accommodation, the latter is at the least equal in area to the portion required for the bar trade, and there may be eleven or more persons in residence at any time or all the time. These facts are, I think, sufficient to show that the dwelling of people in the hotel is a substantial purpose of its existence, and it is, therefore, a dwellinghouse.

I do not find much assistance from the cases cited. They certainly show that in other statutes hotels, bakehouses with living quarters, and other buildings have been held to be dwellinghouses, and that the taking in of boarders did not take a building out of the description of "dwellinghouse," but, as *Lord Blackburn* said in *River Wear Commissioners v. Adamson* (1877) 2 App. Cas. 743: "the meaning of words varies according to the circumstances with respect to which they were used" (*ibid.*, 763). We were referred to s. 306 of the Municipal Corporations Act, 1933, which is said to be the only section in the Act, apart from those relating to water rates, where the word "dwellinghouse" is used, and it would certainly seem that in that section all buildings where dwelling is a substantial purpose of the building would be included in the term "dwellinghouse," including, I would think, licensed hotels, if they had not been expressly excluded, but the amount of assistance which this comparison affords is not perhaps very great.

Mr. *Watson* contended for a construction that would limit the term "dwellinghouse" to a private dwelling, and prayed in aid a principle which has been followed in some cases—namely, that, in a case of doubt,

the interpretation should be adopted which is most favourable to the consumer. If this were done, we should find it necessary to adopt a different meaning for "dwellinghouse" in s. 82 from that which we must adopt in s. 83, because in the one case it is a disadvantage to the consumer to be the occupier of a dwellinghouse and in the other case it is an advantage. In any case, the rule is only one of last resort, and must yield to what is said to be the paramount rule that every statute is to be expounded according to its expressed or manifest intention: see *Maxwell on The Interpretation of Statutes*, 9th Ed. 289. Similar comments may be made on the countervailing doctrine relied on by Mr. Butler—namely, that the construction to be adopted should be the one which would best conduce to the smooth working of the system. I adopt with respect the incisive and picturesque language of *Denning, L.J.*, in *Seaford Court Estates, Ltd. v. Asher* ([1949] 2 K.B. 481; [1949] 2 All E.R. 155), where he said: "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the Legislature. That was clearly laid down by the resolution of the Judges in *Heydon's Case* (1584) 3 Co. Rep. 7a, and it is the safest guide to-day" (*ibid.*, 498, 499; 164).

It follows that, in my view, the judgment appealed from is correct, and this appeal must be dismissed with costs on the middle scale, plus 50 per cent. as the case is from a distance, and the respondent is allowed £15 15s. for the second day of hearing.

HAY, J. On the hearing of this appeal, I was greatly impressed by the argument of counsel for the appellant, and was disposed to think that the appeal should succeed on the grounds so persuasively put by Mr. Watson. Doubts, however, supervened on further consideration of what can only be described as a difficult and unsatisfactory legal position, and I desire to express my indebtedness to the clear and convincing reasoning of my brother Adams for clarifying my own mind on the subject. Having had the opportunity of studying what he has written, I find myself in complete agreement with the whole of it.

If the matter were *res integra*, the result, from my point of view, may well have been different, but, for the reasons given by *F. B. Adams, J.*, I can see no escape from the decision of the Court of Appeal in *Vaile and Sons, Ltd. v. Mayor, &c., of Auckland* ([1931] N.Z.L.R. 769). As

regards the argument so strongly relied on by Mr. *Watson* (that an ambiguity in a taxing statute should be resolved in a manner most favourable to the taxpayer), I agree with *Stanton, J.*, that resort cannot be had to that doctrine in the circumstances of the present case.

I therefore respectfully concur in the conclusion arrived at by each 5  
of my brethren.

F. B. ADAMS, J. Subsections 1 and 2 of s. 82 of the Municipal Corporations Act, 1933, permit the levying of water rates in respect of:

- (a) The ordinary supply within the meaning of any by-law defining the same. 10
- (b) The extraordinary supply within the meaning of any by-law defining the same; and
- (c) Water-meters provided by the Council for measuring the quantity of water supplied.

Subsections 3, 4, 5, and 6 provide that such rates in respect of "the 15  
"ordinary supply" shall be based on annual value, and, "In respect of  
"the ordinary supply to lands and dwellinghouses," shall be either a  
uniform rate or a graduated rate, and fix certain maximum and minimum  
charges. Then subs. 7 provides that, "In respect of the ordinary 20  
"supply to buildings (other than dwellinghouses)," the rates are not  
to exceed one-half of the rates previously specified. Under subs. 9,  
the rates "In respect of the extraordinary supply" are to be such as may  
be fixed by by-law or as may be agreed on.

It will be observed that no restriction is imposed on the rates that  
may be levied in respect of extraordinary supply or on meter charges, 25  
and that the statute itself does not define "ordinary" or "extra-  
"ordinary" supply, but leaves them to be defined by by-law. There is  
no requirement that the supply of water to dwellinghouses shall be  
treated as "ordinary supply."

Under the relevant by-law of the Auckland City Council, the supply 30  
of water for certain "strictly domestic purposes" is defined as "ordinary  
"supply." This is irrespective of the nature of the building. The  
specified purposes appear to include all the usual indoor requirements  
of a dwelling, but water supplied to other buildings for the same purposes  
is within the definition. The definition ends by excepting anything 35  
that falls within the definition of "extraordinary supply."

The definition of "extraordinary supply" begins with words which  
cover the supply of water for any purposes other than those already  
mentioned, and then proceeds to enumerate a variety of purposes which  
are to be extraordinary supply. These include. 40

Water-closets, baths, and urinals in hotels and lodging-houses having accom-  
modation for five or more lodgers.

Trade purposes of any kind whatsoever . . .

Bottle-washing.

Bars of licensed hotels and clubs. 45

There are others that might be relevant in the case of some hotels,  
but those quoted are the only ones relevant to hotels in general. Un-  
less the reference to "trade purposes of any kind whatsoever" is all-  
inclusive in the case of an hotel—which seems unlikely—the supply of  
water to an hotel will be partly ordinary supply and partly extra- 50  
ordinary. Some at least of the water used—*e.g.*, the water used by  
licensee and staff for drinking, or for personal ablution otherwise than in  
a bath—though probably it will be only a small fraction of the whole,  
will fall within the "strictly domestic purposes," while the rest will be

extraordinary supply. In practice, the whole is treated as extraordinary supply.

We are not told how the rate charged by the Council for extraordinary supply has been fixed, whether by resolution, by by-law, or otherwise. What we are told is contained in para. 4 of the Waterworks Engineer's affidavit, as follows :

4. The rate in respect of extraordinary supply is (with certain exceptions where a flat rate is charged irrespective of quantity of water consumed) calculated on the basis of the quantity of water actually supplied as measured by meter on a quarterly basis provided that the minimum charge each quarter shall be one-quarter of the amount of water rates that would be payable (as for ordinary supply) in respect of the property.

As indicated above, there is no statutory limit on the rates that may be charged for extraordinary supply. I understand the paragraph just quoted as meaning that the Council levies its rates for extraordinary supply by the use of water-meters as authorized by s. 82 (2) (c) set out above and by s. 85, but without allowing the amount payable to be ascertained wholly by reference to the meter measurements. If the quarterly sum arrived at by means of the meter measurements is less than one-quarter of the annual rate that would be payable as for ordinary supply, then the latter amount must be paid as a minimum charge. In effect, the consumer of an extraordinary supply pays, in each quarterly period, either (a) the appropriate charge based on gallons consumed, or (b) a quarter of the rate that would be payable by him for the year if he were rated for ordinary supply in pursuance of s. 82 (2) (a). He pays the higher of the two figures. He is not rated wholly on meter measurement under s. 85 or wholly on the annual value under s. 82. He may thus pay a charge which is out of proportion to his consumption of water, and which may exceed the amounts payable by other consumers for the same, or a greater, quantity of water, and he has not the satisfaction of knowing that this apparent anomaly is created by the statute, or is merely an unavoidable consequence of a system of rating which is *ex facie* equal in its operation. It was stated in argument that the appellant pays at present far more than the value of water supplied. The premises are rated on an annual value which takes into account the enhanced value of the premises due to the existence of the licence and the goodwill arising therefrom, and it seems clear that, as the appellant complains, the premises are treated as business premises for the purpose of assessing the annual value but as a "dwellinghouse" for the purpose of assessing the water rate, and this notwithstanding the fact that the supply of water is classified as "extraordinary," and not domestic. I make no comment, but merely state the facts. Whether the Council is entitled to levy the rate in the way it does is a question that does not arise.

The minimum charge levied on the appellant as aforesaid being calculated by reference to the rate that would be payable as for ordinary supply, it is common ground that s. 82 (7) will have the effect of halving the maximum rate if the premises are within the words "buildings (other than dwellinghouses)." It is in this indirect way that the question arises as to the meaning of s. 82 (7), and arises, not with reference to "ordinary" supply in accordance with its terms, but with reference to "extraordinary" supply, to which the Legislature has not applied it.

In my opinion, we are bound to interpret s. 82 (7) as it stands in the statute, and without regard to the wording of any by-law. No by-law can throw light on the intention of the Legislature; and, if by-laws

were used in aid of construction, the meaning of the statute would differ in different municipalities in accordance with the wording of their respective by-laws.

Some reference was made to characteristics peculiar to this hotel—*e.g.*, to the admitted fact that the licensee is not a tenant, but is a servant of the appellant. In my opinion, there are no facts sufficient to differentiate this case from the general case of a licensed hotel, and I think the question is whether, in general, such an hotel is or is not a “dwellinghouse.” If there are exceptional hotels that may not be covered by a general rule, their cases must be considered on their own particular facts. There are no special differentiating facts in this case.

I have examined all the cases that were cited as bearing on the meaning of the word “dwellinghouse.” The word is, it seems, ambiguous, and its meaning may vary somewhat from context to context. Unfortunately, the context in which s. 82 (7) appears is destitute of any clear indication of the purpose of the Legislature in enacting that subsection, and endeavours to ascertain such purpose resolve themselves, I think, into guess-work. In the words of *Viscount Haldane, L.C.*, in *Inland Revenue Commissioners v. Herbert* ([1913] A.C. 326, 332): “It is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the statute” (*ibid.*, 332).

The word “dwellinghouses” appears in s. 82 (4) of the Act, in the phrase “lands and dwellinghouses,” in obvious contradistinction to the “buildings (other than dwellinghouses)” referred to in subs. 7. No help can be derived from this. The word appears elsewhere in the statute, so we were told, only in ss. 83, 84, and 306. While there is no general rule that the same meaning must be given to an expression in every part of a statute or other document, it is reasonable to suppose that the meaning will be the same throughout, and a difficulty or ambiguity may be solved by resorting to this presumption: *Watson v. Haggitt* (1927) N.Z.P.C.C. 474, 476), *Spencer v. Metropolitan Board of Works* (1882) 22 Ch.D. 142, 162), and *Maxwell on The Interpretation of Statutes*, 9th Ed. 323. As s. 82 is ambiguous in its use of the word “dwellinghouse,” I think it is permissible here to consider the meaning with which the word is used elsewhere in the statute. Section 84 is not helpful. The provisions of s. 306 are such as might have applied to licensed premises, and, in order to ensure that the word “dwelling-house” as used therein should not be construed as including such premises, the Legislature has expressly excluded such premises from the application of the section. The section could apply only if such premises were within the meaning of the word “dwellinghouse,” and it is a legitimate inference that the Legislature envisaged the possibility of such a construction and thought the word so wide in its import that it might be read as including such premises. It is impossible to rely much on this argument, as the exclusion may be only *ex abundanti cautela*; but, for what it is worth, the exclusion from s. 306 favours the view that a licensed hotel may be a “dwellinghouse” within the meaning of the Act.

As to s. 83, the phrase is “Any dwellinghouse or other building,” and the object of the section is relief from water rates in the event of inoccupancy. The same phrase occurred *in pari materia* in s. 69 of the Rating Act, 1925, and was authoritatively construed in *Vaile and Sons, Ltd. v. Mayor, &c., of Auckland* ([1931] N.Z.L.R. 769); and, while the Court was concerned primarily with the words “other building,” it was

impossible to construe that phrase without construing the word "dwelling-house," and the Court defined that word in accordance with what was said by *Lord Loreburn, L.C.*, and *Lord Atkinson in Lewin v. End* ([1906] A.C. 299). That case dealt with the word "house"—not the word

- 5 "dwellinghouse." The extracts quoted and applied by our Court of Appeal ([1931] N.Z.L.R. 769, 776) were as follows: *Lord Loreburn, L.C.*, said: "The Act does not give any definition of what is meant by the word 'house,' but imports that it shall be a place of residence. If a building is dwelt in—I do not mean the mere presence of a caretaker—  
10 "no point can arise. If it be not so used, then in my opinion the structure and character of the building as a whole should be regarded, in order to see whether it is fit or can readily be fitted for such use by any class or condition of persons in the ordinary way of living" ([1906] A.C. 299, 302). *Lord Atkinson* said: "The question turns upon the  
15 "meaning of the word 'house.' I think it must mean a dwellinghouse. By a 'dwellinghouse' I understand a house in which people actually live or which is physically capable of being used for human habitation" (*ibid.*, 304).

- The view of our Court of Appeal was, accordingly, that a building is  
20 a "dwellinghouse" if it is dwelt in otherwise than by the mere presence of a caretaker, or if it is a house in which people live, or which is physically capable of being used for human habitation; and the *ratio decidendi* was that "dwellinghouse" meant a dwellinghouse as defined, and "other building" meant any building *ejusdem generis* with a dwellinghouse.

- 25 It is obvious that the definition derived from the dicta in *Lewin v. End* ([1906] A.C. 299, 302, 304) through the medium of *Vaile's* case ([1931] N.Z.L.R. 769) is far from complete or precise. There must apparently be some substantial measure of occupation by way of habitation in cases where actual habitation is the test. The mere presence  
30 of a caretaker is not likely to suffice: *cf.* the dicta on that point of *Scrutton and Greer, L.JJ.*, in *Hicks v. Snook* (1928) 93 J.P. 55, 56). But the vagueness of the definition in this respect is irrelevant to the present case. It is equally unnecessary in this case to consider what degree of adaptability for human habitation will suffice in the case of  
35 buildings not actually inhabited. It is sufficient to say that, putting aside extreme cases as illustrated by the case where there is only a caretaker in residence, a building in which people actually live is a "dwelling-house" within the definition adopted in *Vaile's* case ([1931] N.Z.L.R. 769); and there can be no doubt that an ordinary licensed hotel such as  
40 the one now in question is such a building. The occupation for actual living purposes is far from nominal.

- The reasoning of the last few paragraphs arises on a consideration of s. 83. In my opinion, the result may properly be applied to s. 82 on the presumption that the word is used with the same meaning in the two  
45 sections; and I hold, accordingly, that the hotel in question in this case is a "dwellinghouse," and that the appellant is not entitled to the benefit of s. 82 (7).

- Support for the view I have taken is also to be found in *Epsom Grand Stand Association, Ltd. v. Clarke* (1919) 35 T.L.R. 525), where a licensed  
50 public house was held to be a "dwellinghouse" within the meaning of the Rent Restriction Acts. *Bankes, L.J.*, said: "In the fullest sense it was a dwellinghouse, and none the less so because it was also a public house" (*ibid.*, 526). The principle that a house was not to be excluded from the Acts merely because the premises were used in part for business purposes was given legislative sanction almost immediately

after that case, with the result that it became unnecessary to rely entirely on the decision. It has, nevertheless, been cited frequently. Before the statute was amended, it was followed by *Russell, J.*, in *Ellen v. Goldstein* ( (1920) 89 L.J.Ch. 586, 591), in regard to a building which comprised a shop and bakehouse on the ground floor with two residential floors above. After the amendment, *McCardie, J.*, in *Waller and Son, Ltd. v. Thomas* ([1921] 1 K.B. 541, 554), while criticizing the decision, relied both on the decision and on the amendment in holding that a licensed public house was a "dwellinghouse" within the Acts, and not "business premises"; and the same learned Judge followed the decision again for the same purpose in *Glossop v. Ashley* ([1921] 2 K.B. 451, 455), and again in *W. H. Brakspear and Sons, Ltd. v. Barton* ([1924] 2 K.B. 88, 92), though on this last occasion with a repetition of his critical view. The decision was similarly applied by *Avory, J.*, in *Roberts v. Poplar Metropolitan Borough Assessment Committee* ([1922] 1 K.B. 25, 29) in the case of a licensed beer-house. Since these decisions, the *Epsom* case ( (1919) 35 T.L.R. 525) has been cited twice with approval in the Court of Appeal: *Hicks v. Snook* ( (1928) 93 J.P. 55, 56) and *Vickery v. Martin* ([1944] K.B. 679; [1944] 2 All E.R. 167). I can see no reason for thinking that in the *Epsom* case ( (1919) 35 T.L.R. 525) a specialized meaning was given to the word "dwellinghouse," or that the Court did otherwise than apply the word in its ordinary sense. Nor do I see any satisfactory ground for holding that there is here a different context such as calls for a different meaning. Uniformity in the interpretation of statutes is not to be sought unduly, but should not be sacrificed without reason.

In my opinion, cases such as *Rolls v. Miller* ( (1884) 53 L.J. Ch. 682) and *In re Marshall and Scott's Contract* ([1938] V.L.R. 98), which deal with covenants in leases prohibiting the user of premises except as a dwellinghouse, are not in point.

I agree that the appeal should be dismissed, and concur in the proposed order as to costs.

*Appeal dismissed.*

Solicitors for the appellant: *Nicholson, Gribbin, Rogerson, and Nicholson* (Auckland).

Solicitor for the respondent: *City Solicitor* (Auckland).

# NORTHERN ROLLER MILLING COMPANY, LIMITED v. COMMISSIONER OF TAXES.

SUPREME COURT. Auckland. 1952. March 25; June 11. F. B. ADAMS, J.

*Public Revenue—Income-tax—Deductions—Lease providing Lessee liable only for Payment of Reduced Rental—Reduction not Set-off in Nature of Capital Receipt—Amount only as reduced and paid allowable as Deduction—Commissioner of Taxes formerly allowing Deduction of Higher Amount—No Estoppel against Him—Taxpayer's Book-keeping Entries not Conclusive—"Loss"—"Expense"—"diture"—Land and Income Tax Act, 1923, s. 80 (2).*

By lease No. 1022, the Auckland Harbour Board leased certain land for the term of forty-six years from September 1, 1890, to certain lessees at the yearly rental of £536 5s., covenanting at the expiration of the term to pay to the lessees half the then value of buildings erected on the land.

In or before 1928, the appellant company had become the proprietor of this lease and of a lease of adjoining land, and had erected a building standing partly on each piece of leased land. On the appellant company's agreeing to surrender lease No. 1022, a memorandum of lease, dated October 23, 1928, and registered as No. 13590, was granted by the Harbour Board to the appellant company in respect of the first-mentioned land for a term commencing on its date and ending on October 4, 1955. The following was a recital in that lease:

"And whereas the Board in pursuance and exercise of the powers conferred on it by s. 3 of the Auckland Harbour Board Empowering Act, 1925 has agreed to accept such surrender and to grant to the Lessee a Lease of the same premises for a term expiring on the 4th day of October 1955 upon the terms and subject to the conditions hereinafter set forth and to satisfy the amount payable to the Lessee under the said Lease Number 1022 as to one half value of buildings by reducing the rent which would otherwise be payable hereunder by the sum of £355 on each of the 1st days of April and October in each year after the 1st day of September 1936 until the expiration of the said term or paying such sum of £355 in cash as the case may be in accordance with the provisions hereinafter appearing."

Lease No. 13590 contained no provision for payment of compensation to the lessee in respect of buildings standing on the land at the end of the term. The *reddendum* provided for a yearly rental of £536 5s. in respect of the period from October 23, 1928, to September 1, 1936 (the same rental as was payable under lease No. 1022, to continue up to the date fixed for the expiry of that lease). The half-yearly reductions of £355 referred to in the above-quoted recital had no application to this period. The *reddendum* then reserved rentals for the remainder of the term, the "rack rent" for the relevant period being £4,144 3s., payable for the period commencing on April 1, 1937, and expiring on September 30, 1955, "the annual rental of £3,434 3s. (being the said rack rent less the aforesaid agreed reduction of £710 per annum)". Such rent was to be by quarterly payments as follows: The sum of £681 0s. 9d. on April 1 and October 1 in each year, and the sum of £1,036 0s. 9d. on January 1 and July 1 in each year.

The question for determination was whether, in calculating its assessable income for the years ending on March 31 in the four years from 1942 to 1945, appellant company was entitled to deduct, in respect of the rent under lease No. 13590, the annual sum of £3,315 6s. 6d. or only the sum of £2,605 6s. 6d. (a difference of £710 in each year).

*Held*, 1. That, on its true construction, the lease did not provide for an annual rental of £4,144 3s. subject to a set-off of half-yearly payments of £355 having relation to compensation for improvements, but made the appellant company liable for the reduced rent (£2,605 6s. 6d.) only; and the true legal effect of the lease, which was unambiguous on that point, could not be dis-



regarded in favour of what was supposed to be its substance as distinct from its form.

*Inland Revenue Commissioners v. Duke of Westminster* ([1936] A.C. 1) followed.

*Henriksen v. Grafton Hotel, Ltd.* ([1942] 2 K.B. 184; [1942] 1 All E.R. 678) applied.

*Secretary of State in Council of India v. Scoble* ([1903] A.C. 299) distinguished.

*Inland Revenue Commissioners v. Wesleyan and General Assurance Society* ([1948] 1 All E.R. 555) and *Potts' Executors v. Inland Revenue Commissioners* ([1951] A.C. 443; [1951] 1 All E.R. 76) referred to.

2. That the appellant company, in calculating its assessable income for the years ending on March 31 in the four years from 1942 to 1945, was not entitled to deduct annually, in respect of the rent, the sum of £3,315 6s. 6d.; as the yearly sum of £710 was neither "expenditure" nor "loss" within the meaning of those terms as used in s. 80 (2) of the Land and Income Tax Act, 1923, the allowable deduction was limited to the sum of £2,605 6s. 6d.

*Auckland Harbour Board v. Northern Roller Milling Co., Ltd.* ([1940] N.Z.L.R. 701) referred to.

3. That, although the Commissioner of Taxes had, in earlier years of assessment, allowed the appellant company to deduct the larger sum, there was no estoppel against him on any ground.

4. That, although counsel for both parties had agreed that the sum deductible was £2,747 6s. 6d., it was the duty of the Court to decide the matter without regard to the concurrence of counsel.

5. That the manner in which the appellant company, in its books of account, had treated the payments of £355 as the equivalent of a capital sum which accrued due from the lessor in 1936, was to be disregarded, as book-keeping entries are not conclusive.

*Doughty v. Commissioner of Taxes* ([1927] N.Z.P.C.C. 616) followed.

CASE STATED under s. 35 of the Land and Income Tax Act, 1923.

By memorandum of lease No. 1022, the Auckland Harbour Board leased a certain parcel of land for the term of forty-six years from September 1, 1890, to certain lessees at the yearly rental of £536 5s., covenanting at the expiration of the term to pay to the lessees half the then value of buildings erected on the land. 5

In or before 1923, appellant had become the proprietor of this lease and of a lease of adjoining land, and had erected a building standing partly on each of the two parcels; and, appellant agreeing to surrender lease No. 1022, a new memorandum of lease, bearing date October 23, 1928, and registered as No. 13590, was granted by the Auckland Harbour Board to appellant in respect of the first-mentioned parcel of land for a term commencing on its date and ending on October 4, 1955. A recital in the new lease read as follows (the italics are those of the learned Judge): 10

And whereas the Board in pursuance and exercise of the powers conferred on it by s. 3 of the Auckland Harbour Board Empowering Act, 1925 has agreed to accept such surrender and to grant to the Lessee a Lease of the same premises for a term expiring on the 4th day of October 1955 upon the terms and subject to the conditions hereinafter set forth and to satisfy the amount payable to the Lessee under the said Lease Number 1022 as to one half value of buildings by reducing the rent which would otherwise be payable hereunder by the sum of £355 on each of the 1st days of April and October in each year after the 1st day of September 1936 until the expiration of the said term or paying such sum of £355 in cash as the case may be in accordance with the provisions hereinafter appearing. 20

Lease No. 13590 contained no provision for payment of compensation to the lessee in respect of buildings standing on the land at the end of the term. The reddendum provided for a yearly rental of £536 5s. in respect of the period from October 23, 1928, to September 1, 1936, and it will 25

be seen that this was the same rental as was payable under lease No. 1022, and was to continue up to the date fixed for the expiry of that lease. The half-yearly reductions of £355 referred to in the recital quoted above had no application to this period.

- 5 The Reddendum then proceeded to reserve rentals for the remainder of the term in the following words (the paragraphing and numbering are those of the learned Judge) :

10 (1) For the period commencing on the 2nd day of September 1936 and expiring on the 30th day of September 1936 a proportionate part of the rack rent of £4,144 3s. per annum payable in advance on the 2nd day of September, 1936.

(2) For the period commencing on the 1st day of October 1936 and expiring on the 31st day of March 1937 the rent of £1,036 0s. 9d. per quarter.

15 (3) For the period commencing on the 1st day of April 1937 and expiring on the 30th day of September 1955 the annual rental of £3,434 3s. (being the said rack rent less the aforesaid agreed reduction of £710 per annum). Such rent to be paid by quarterly payments as follows : The sum of £681 0s. 9d. on the 1st day of April and the 1st day of October in each year. And the sum of £1,036 0s. 9d. on the 1st day of January and the 1st day of July in each year.

20 (4) And for the balance of the said term commencing on the 1st day of October 1955 and expiring on the 4th day of October 1955 a proportionate part of the said rack rent of £4,144 3s. per annum.

All such rents save as to the period commencing on the 2nd day of September 1936 and expiring on the 30th day of September 1936 to be paid in advance on the 1st day of the months of January April July and October in each year.

- 25 The question for determination was whether, in calculating its assessable income for the years ending on March 31 in the four years from 1942 to 1945, appellant was entitled to deduct, in respect of the rent of certain leasehold premises under lease No. 13590, the annual sum of £3,315 6s. 6d., or only the sum of £2,605 6s. 6d.—a difference of £710 in each year.
- 30 There were now seven more years in which the same question had arisen.

*Wheaton*, for the appellant.

*Rosen*, for the respondent.

*Cur. adv. vult.*

- F. B. ADAMS, J. It will be seen that paras. 1, 2, and 4 of the
- 35 reddendum of the lease deal with comparatively short periods, and provide for rentals at the rate of £4,144 3s. per annum. It is in the period covered by para. 3—the period that is relevant in this case—that the agreed half-yearly reductions of £355 appear, effect being given to them by fixing the rental at an annual total of £3,434 3s., payable by
- 40 alternate quarterly payments of £681 0s. 9d. and £1,036 0s. 9d.

The first covenant on the part of the lessee is for due and regular payment of the rent reserved. An action on that covenant could only be for the sums fixed as rentals in the reddendum.

- 45 The only other relevant provision is the proviso to the re-entry clause, which reads as follows :

Provided however that in the event of any such re-entry taking place after the 1st day of September 1936 the Board shall nevertheless be liable to pay and shall continue to pay to the Lessee the sum of £355 on each of the said 1st days of April and October from that date until such date as the said term would have been determined by effluxion of time had no such re-entry taken place or at the option of the Board the then value computed at 5 per centum per annum interest of such of the aforesaid payments of £355 as are then unpaid.

- 50 In my opinion, this proviso explains the concluding words of the recital quoted above, where the words appear :
- 55 or paying such sum of £355 in cash as the case may be in accordance with the provisions hereinafter appearing.

The proviso is the only provision to which the words can refer, and the effect accordingly is that payment in cash is contemplated only in the event of re-entry. The concluding words of the proviso may be intended to give the lessor an option to redeem the half-yearly payments at any time after re-entry; but, even if the words "payments . . . unpaid" have reference to the period before re-entry, they cannot, in my opinion, be construed as making moneys payable which are in fact not made payable either in the reddendum or by express or implied covenant.

It will be seen that the reductions of rent contemplated in the recital have actually been made before arriving at the figures appearing in the reddendum. The lessee is liable for the reduced rent only; and, while rent continues to be payable—i.e., until re-entry or the end of the term—there is no obligation imposed upon the lessor in respect of the reduction. The only obligation imposed on the lessor is to pay equivalent sums in the event of re-entry. The same result might have been achieved by a covenant on the part of the lessee to pay an unreduced rental during the continuance of the term, a covenant by the lessor to pay to the lessee the half-yearly sums of £353, and a provision for the setting-off of the moneys payable by the lessor under that covenant against moneys payable simultaneously by the lessee under the first covenant. The set-off would, of course, have ceased to apply after re-entry, and the lessor would thereafter have been required to pay in cash. There can be no doubt, however, that, as the lease stands, the rentals payable thereunder are the varying rentals fixed for the successive periods by the reddendum, and that, notwithstanding references to a rack rent of £4,144 3s., no such rent is made payable during the relevant period. The reason why the rentals were fixed as they are may be found in the recital, but this is explanatory only, and cannot modify the terms of the reddendum.

Lease No. 13590 came before the Court of Appeal in *Auckland Harbour Board v. Northern Roller Milling Co., Ltd.* ([1946] N.Z.L.R. 701), the question being as to the rights of the lessee with regard to the 20 per cent. reduction of rental under the National Expenditure Adjustment Act, 1932. The case proceeded on the footing that an annual rental of £4,144 3s. was payable under the lease from September 1, 1936. The following passage occurs in the preliminary statement of facts, at p. 702 :

The lease contained provision whereby one-half the value of the buildings payable to the lessee was to be satisfied by reducing the rent which would otherwise be payable for a time by a sum of £710 per annum or by paying this annual sum in cash, but this was admittedly immaterial for this case.

In the argument of counsel for the Board, the rental was said to have been raised, as from September 1, 1936, to £4,144 3s., while counsel for the present appellant claimed that his client was entitled to a reduction of 20 per cent. in the yearly rental of £4,144 3s. as from that date, and said that it was common ground that this was the yearly rate of rent payable. The accuracy or inaccuracy of these statements was not canvassed. The parties to the lease have in fact proceeded, in the years from 1936 to 1945, on the assumption that the lessee was entitled to a reduction of 20 per cent. on £4,144 3s. The point decided by the Court was that the reduction was applicable, not only to the rental that was payable when the Act came into force, but also to each increased rental becoming payable while the statute continued in operation. The Court interpreted the statute, not the lease, and the judgments are silent as to the true amount of the rental in the period now relevant. There was certainly no decision that the true annual rental was £4,144 3s., and, whatever may be the position as between the parties, the decision does not

bind the Commissioner to that view. The figures appearing in the present Case Stated show that the parties to the lease have continued to apply the 20 per cent. reduction to the supposed rental of £4,144 3s., with the result that the rental actually paid during each of the income  
5 years now in question was reduced by £828 16s. 6d. from £3,434 3s. to the sum of £2,605 6s. 6d.

The action of the Auckland Harbour Board in accepting this reduction clearly assumes that the annual rental is £4,144 3s. It is not necessary to consider whether the assumption is right or wrong for the purposes  
10 of the National Expenditure Adjustment Act, 1932; and, if there be a doubt about this, one can well understand that, as a matter of fair dealing between the parties to the lease, it is right and proper that the reduction should be based on a supposed rental of £4,144 3s. In the circumstances, it might be unconscionable on the part of the Board to take any other  
15 view. But the question as to what is fair and equitable between the parties to the lease in applying to it the provisions of the special statute is one which in no way affects the true construction of the lease. Nor is the Commissioner of Taxes affected by the fact that in earlier years of assessment he allowed appellant to deduct annually the sum of  
20 £3,315 6s. 6d., instead of, as he now contends to be correct, the sum of £2,605 6s. 6d. Whether he did so with full knowledge of the facts does not appear; but, in any event, there is no estoppel as against him, either by reason of the decision of the Court of Appeal or on any other ground.

Section 80 (2) of the Land and Income Tax Act, 1923, limits deductions,  
25 save as otherwise provided, to "*expenditure or loss exclusively incurred*" "in the production of the assessable income." In my opinion, there was neither "*expenditure*" nor "*loss*" in the years in question to the extent of these half-yearly sums of £355. Appellant's right to deduct rent was not, and could not be, disputed; and Mr. *Rosen* admitted that  
30 the parties to the lease could have put the transaction in such a form as would have entitled appellant to deduct a rental of £4,144 3s. less the statutory reduction of 20 per cent. Mr. *Wheaton* contended that they had in fact done so; that the true rent payable under the lease is £4,144 3s.; that there is in effect a set-off of the half-yearly payments of  
35 £355; and that the latter represent a capital receipt not subject to the tax. On the view I take of the case, it will be unnecessary to consider whether these sums, if actually payable by the lessor, would have been capital or income receipts in the hands of the taxpayer.

I need not traverse the authorities that were cited on the question of  
40 set-off. I can find no set-off in the lease. Mr. *Wheaton* was no doubt right in his submission that the reduction of the rental by these half-yearly sums—they would in the total amount to £13,490—represented the consideration received by appellant in return for the surrender of its right to compensation in respect of buildings on the termination of lease  
45 No. 1022. Presumably they were so calculated that their present value as at September 1, 1936, was equivalent to an agreed figure representing one-half of the estimated value that the buildings on the land in 1928 would possess on September 1, 1936. I am content to assume, without deciding, that, if the one-half value had been paid in cash, it would not  
50 have been taxable in the hands of appellant, and that, even if it had been paid by instalments spread over the term of lease No. 13590, it would still not have been taxable. I have not considered, and need not consider, the authorities on that point. But the truth is that the parties never contracted for payment of the compensation moneys, either by way of a  
55 lump sum or by way of instalments. The only contract for payment

is in the proviso to the re-entry clause, and the obligation to pay created thereby is contingent on re-entry. For all the purposes of the lease, the true rents are those reserved in the reddendum, and it is impossible, in my opinion, to construe the lease as providing for an annual rental of £4,144 3s., subject to a setting-off of half-yearly payments of £355. As a matter of construction, neither the recital nor the proviso to the re-entry clause can qualify the plain words of the reddendum. Even the recital does no more than narrate an agreement whereby the liability for compensation in respect of the buildings was to be satisfied "by reducing the rent which would otherwise be payable hereunder", and the clear intention was to make no more rent payable than was stipulated for in the reddendum. Mr. *Wheaton* argued that the relevant provisions are mere machinery to avoid the exchanging of cheques, but, unfortunately perhaps, they are machinery which renders unnecessary either the exchanging of cheques or the setting-off of one liability against another. The lease is unambiguous on this point, and the Court cannot yield to Mr. *Wheaton's* appeal to construe the lease in conformity with a supposed general intention or design. Where a document is unambiguous, a Court of construction is not concerned with the motives or intentions which lay behind it.

Mr. *Wheaton* urged that the Court must look to the substance of the transaction. There are no doubt occasions on which the Court will look to the substance and disregard the form of a transaction; but the idea that transactions may be taken to pieces and put together again in different shape in order that they may either attract or escape taxation received its *quietus* in *Inland Revenue Commissioners v. Duke of Westminster* ([1936] A.C. 1). As explained by Lord *Simon* in *Inland Revenue Commissioners v. Wesleyan and General Assurance Society* ([1948] 1 All E.R. 555), while the name given to a transaction by the parties concerned does not necessarily decide its nature, the doctrine that, for purposes of taxation, the true legal effect of a transaction can be disregarded in favour of what is supposed to be its substance as distinct from its form was, as had been said by Lord *Greene*, M.R., in the Court below, finally exploded in *Inland Revenue Commissioners v. Duke of Westminster* ([1936] A.C. 1). The reference was to cases in which there are two methods of achieving a particular financial result, the result being precisely the same in each case, but one method attracting tax and the other not. In *Potts' Executors v. Inland Revenue Commissioners* ([1951] A.C. 443; [1951] 1 All E.R. 76), an attempt was made, on the authority of certain decisions under other statutes, to treat certain payments made by a company as being payments made to the taxpayer, the argument being, I think, very similar to Mr. *Wheaton's* reliance on the cases as to set-off. Lord *Normand* said that to apply those decisions in construing a taxing Act was "flatly inconsistent with the principle established by *Inland Revenue Commissioners v. Duke of Westminster* ([1936] A.C. 1)" (*ibid.*, 458; 82). The Court, he added: "is not entitled to say that for the purposes of taxation the actual transaction is to be disregarded as 'machinery' and that the substance or equivalent financial results are the relevant consideration" (*ibid.*, 458; 82).

Mr. *Wheaton* relied on *Secretary of State in Council of India v. Scooble* ([1903] A.C. 299), where Lord *Halsbury*, L.C., spoke of "looking at the whole nature and substance of the transaction" (*ibid.*, 302). But this decision was considered by the House of Lords in *Inland Revenue Commissioners v. Duke of Westminster* ([1936] A.C. 1), and was explained by Lord *Russell of Killowen* as being a case in which, the legal rights of the

parties being ascertained, the Court might "disregard mere nomenclature" (*ibid.*, 25).

- While the principle was applied in favour of the taxpayer in the cases cited above, an illustration of its application against the taxpayer is to be found in the judgment of Lord Greene, M.R., in *Henriksen v. Grafton Hotel, Ltd.* ([1942] 2 K.B. 184, 193 : [1942] 1 All E.R. 678, 683), in a passage which was relied upon by Mr. Wheaton, but which, in my opinion, is an answer to his argument. In that case, the lessee had covenanted to pay certain sums which might equally well have been paid by the lessor, and which were held to be capital payments, and Lord Greene, M.R., said : "An attempt was made to rescue this argument from shipwreck by saying that if the lessor had undertaken to bear these payments and had consequently exacted a high rent, the full rent could have been deducted as an expense. This argument has a familiar ring. The answer to it is that this was not the contract which the parties chose to make. It frequently happens in income tax cases that the same result in a business sense can be secured by two different legal transactions, one of which may attract tax and the other not. This is no justification for saying that a taxpayer who has adopted the method which attracts tax is to be treated as though he had chosen the method which does not or vice versa" (*ibid.*, 193 ; 683).

In the present case, also, the lessor might have exacted, but did not exact, the higher rent.

- Mr. Wheaton argued, and Mr. Rosen also submitted, that the proper deduction to be allowed is not the annual sum of £2,605 6s. 6d., arrived at by making the statutory reduction of 20 per cent. from the so-called rack rent of £4,144 3s., but the sum of £2,747 6s. 6d., arrived at by basing the reduction on the true rental of £3,434 3s. The difference is £142 per annum, and is equivalent to 20 per cent. of the half-yearly sums of £355. I am unable to agree, and think it the duty of the Court to decide the matter without regard to the concurrence of counsel. The rent actually paid in each of the relevant years was £2,605 6s. 6d., and a greater deduction may not be claimed on the ground that the lessor might possibly have exacted a higher payment. It may be, though I express no opinion about it, that the decision in *Auckland Harbour Board v. Northern Roller Milling Co., Ltd.* ([1946] N.Z.L.R. 701) estops the Board from claiming more than £2,605 6s. 6d.; but, whether there be an estoppel or not, the appellant cannot, so long as the Board is content to accept the lower sum in respect of any year, deduct more in respect of that year than the sum so accepted. Where the parties to a transaction have determined such a matter, whether expressly or by implication from the course of their dealings, it is not, in my opinion, open either to the Commissioner or to the Court to proceed on hypothetical assumptions to the contrary.
- According to the Case Stated, appellant has, in its books of account, treated the annual sum of £710 as the equivalent of a capital sum which accrued due from the lessor in 1936. But book-keeping entries are not conclusive : *Doughty v. Commissioner of Taxes* (1927) N.Z.P.C.C. 616, 623).
- For these reasons, the appeal is dismissed, with costs £36 15s. to be paid by appellant to respondent.

*Appeal dismissed.*

Solicitors for the appellant : Bamford, Brown, and Wheaton (Auckland).

Solicitor for the respondent : Crown Solicitor (Auckland).

## STUBBING v. BAIGENT.

SUPREME COURT. Auckland. 1951. July 12; August 8. STANTON, J.

*Transport—Offences—Trade Motor—Loading or Unloading in Course of Trade—Defence Available to Charge of Traffic Offence—Obligation not to transgress Regulations beyond Departure justified in Particular Circumstances—“Due consideration to the safety and convenience of other road users”—Traffic Regulations, 1936 (Serial Nos. 1936/86, 1949/142), Reg. 4 (7) (j) (9).*

The driver of a trade motor is entitled to the benefit of the defence specified in Reg. 4 (9) of the Traffic Regulations, 1936 (substituted by Reg. 4 of Amendment No. 7), while loading or unloading it, unless he did not have “due consideration to the safety and convenience of other road users,” which involves the obligation not to transgress the provisions of the Regulations beyond what the exigencies of loading or unloading in the particular circumstances justify or require as a departure from the Regulations.

Thus, the driver of a milk-delivery van, which was a “trade motor” for the purposes of Reg. 4 (9) of the Traffic Regulations, 1936, was not giving “due consideration to the safety and convenience of other road users” when he drove his milk-delivery van on the wrong side of the roadway and parked it there while he was unloading it by the delivery of milk bottles to residents on the right-hand side of such roadway, as the unloading operation could have been as easily and conveniently carried out by driving and parking the van on its correct side; and, therefore, he was not entitled, when charged with an offence under Reg. 4 (7) (j), to the benefit of the defence under Reg. 4 (9).

APPEAL from the appellant's conviction in the Magistrates' Court at Auckland on an information that he on March 18, 1951, at Auckland, being the person in charge of a vehicle, to wit, a vehicle having more than two road wheels on a road, to wit, Saint Andrews Road, did park such vehicle otherwise than parallel with the direction of the roadway and with the left side of such vehicle as close as practicable to the near edge of the roadway.

The evidence was called, and argument was heard before the learned Judge, from whose judgment the facts sufficiently appear.

*G. P. Hanna*, for the appellant.

*G. R. S. Meredith*, for the respondent.

*Cur. adv. vult.*

STANTON, J. The appellant is the driver of a milk-delivery van, from which he was delivering bottles of milk to houses in St. Andrews Road in the City of Auckland. These houses were on the right-hand side of the road facing south, and the appellant was proceeding in that direction. At the time of the alleged offence, his vehicle was stationary on that right-hand side of the road, and was facing south—that is, in the incorrect position, as required by the Traffic Regulations, 1936. Appellant does not dispute this, but claims that he is entitled to rely on the exception contained in cl. 9 of Reg. 4, which, as substituted by Reg. 4 of Amendment No. 7 (Serial No. 1949/142), is as follows:

It shall be a defence to any person who is in charge of any trade motor and who is charged with a breach of paragraph (c), (h), or (j) of clause (7) hereof if such person proves that the act complained of was done either during the loading or unloading of the vehicle in the course of trade with due consideration to the safety and convenience of other road users, or in accordance with the directions of a notice, traffic sign, or marking or sign on the roadway.

It is admitted by the respondent that the milk-van is a “trade motor,” but it is suggested that what appellant was doing was not “unloading” within the meaning of the Regulation; that this contemplates some difficult or onerous operation which could not be conveniently carried out if the parking requirements of Reg. 4 (7) (j) were complied with. I



- quite agree that some such provision would have been reasonable, and that, if the Regulation had been so framed, appellant could not have justified his disregard of Reg. 4 (7) (j), as he could have organized his milk delivery with equal convenience so as to face his vehicle when parked in the correct direction. But I do not think we can so read the Regulation. "Unloading" is a popular term, and would properly apply to delivering bottles of milk from a van, as was done in this case. I think, therefore, that appellant was, in the circumstances, entitled to the benefit of the defence under cl. 9 unless it can be said that he did not have due consideration to the safety and convenience of other road users. The learned Magistrate intimated that, in his view, a vehicle parked on the wrong side of the road with its parking-lights showing could well lead to confusion in the minds of drivers of approaching vehicles, and it was, therefore, without due consideration for the safety of other users of the road.
- 15 I should hesitate to say that any parking on the wrong side of the road must be without due consideration for other road users, but I think that the requirement that the driver of an unloading trade motor shall have due consideration for other road users requires him to adhere to the provisions of the Regulations except to the extent that the exigencies of
- 20 unloading justify or require a departure from them. In the case of a van such as this, it can be as easily unloaded when parked in the correct position as in the incorrect position, and I do not think, therefore, that he can justify a disregard of the provisions of Reg. 4 (7) (j) under this exception.
- 25 Giving due consideration to other road users involves the obligation not to transgress the provisions of the Regulations beyond what the exigencies of unloading in the particular circumstances require, and, when, as here, the unloading operation could be as conveniently carried out by routing the van so as to travel and park on its correct side, a driver
- 30 is not giving due consideration to other road users if he reverses that process and either drives or parks on the wrong side of the road.

The appeal must, therefore, be dismissed with costs £7 7s. and disbursements, including witnesses' expenses to be fixed if necessary by the Registrar.

*Appeal dismissed.*

Solicitors for the appellant: *Butler, White, and Hanna* (Auckland).

Solicitors for the respondent: *Meredith, Meredith, Kerr, and Cleal* (Auckland).

## CRIMP v. HOROWHENUA COUNTY.

SUPREME COURT. Wellington. 1952. April 30; June 26. HAY, J.

*Counties—Water-supply Special Rating Area—Water-supply installed therein—No Extension of Scheme—Part of Block of Land within Such Area and Part outside It but within County Boundaries—Water-supply connected to House on Such Block within Rating Area—Owner extending Water-connection to House on Block but outside Rating Area—Council cutting Water Pipe-line at Boundary thereof—Water-supply Scheme confined to Lands situated within Rating Area—No Trespass in entering Land and cutting Pipe-line—Counties Act, 1920, ss. 122, 150—Local Bodies Loans Act, 1926, s. 3 (3)—Municipal Corporations Act, 1933, ss. 87, 248.*

Though there is nothing in the Counties Act, 1920, conferring power on a County Council to set up a water-supply for a limited district within the county, it is implied in ss. 122 and 150 of that statute and in s. 3 (3) of the Local Bodies



Loans Act, 1926, that a public work (which includes a waterwork) may be undertaken by a County Council for the benefit of portion of the county area, and on terms that the cost is to be borne by the ratepayers of that portion alone.

In 1939, the defendant created a water-supply special rating area for that portion of the Te Horo Riding known as the Waimeha Township. Pursuant to the authority of a poll of ratepayers in that area, a loan of £3,300 was raised by the Council under the Local Bodies Loans Act, 1926, the interest and other charges in respect of the loan being secured by a special rate of 2d. in the £ upon the rateable value (on the basis of the capital value) of all the rateable property in the special rating area as defined in the special resolution passed for the purpose. The water-supply was installed, and a special by-law, entitled the Waimeha Township Water Supply By-law, 1939, was made and ordained by the Council in relation thereto. An Order in Council was issued on December 17, 1929 (*1929 New Zealand Gazette*, 3323), pursuant to s. 182 of the Counties Act, 1920, conferring on the Council all the powers with respect to the supply of water for domestic or industrial purposes exercisable by a duly constituted Borough Council under specified portions of the Municipal Corporations Act, 1920, and its Amendments. The powers so conferred are those now appearing in the Municipal Corporations Act, 1933, as ss. 82-84, 87, 88, Part XX (with the exception of ss. 251, 253, and 254), and s. 346.

The plaintiff was the owner and occupier of a block of land (containing in all approximately 6 acres), a small portion of which was within the special rating area and the greater portion of which was outside the area, though within the boundaries of the county. On or about October 23, 1942, the plaintiff's predecessor in title made application to the defendant for a permit to make a connection to the water-supply system for an ordinary water-supply in respect of that portion of the land situated within the special rating area. A permit to make the connection applied for was granted, the permission being expressly limited to an ordinary supply. The connection of water not only served a cottage upon the land within the special rating area, but also led to and supplied certain standpipes upon the adjacent land (outside the area), to enable a market-garden then operated upon such adjacent land to be watered.

In 1948, the plaintiff extended the water-supply line from the then existing reticulation to a more distant part of his land, on which was erected another dwellinghouse, in order to provide a domestic supply to that dwellinghouse, which was situated at a considerable distance beyond the boundary of the special rating area. The Council wrote to plaintiff drawing attention to what was called the unauthorized connections outside the special area, and notifying him that a disconnection would be made at the expiration of fourteen days from that date. In spite of plaintiff's protest, the water pipe-line on plaintiff's property was cut by the Council at a point just beyond the boundary of the special area. The plaintiff thereupon reconnected the supply. Notwithstanding his representations to the Council with the object of arriving at some arrangement which would ensure to him the use of the water for his house beyond the special area, the Council, on March 28, 1949, again cut the pipe-line at the same point as before, and again the plaintiff repaired it. On April 6, 1949, the Council for the third time cut the pipe-line at the same point.

In an action claiming an injunction to restrain the defendant's Council from trespassing by its servants or agents on the plaintiff's land, from interfering with the water-supply thereon, and from moving or removing any part of his property,

*Held*, 1. That the Council had full authority to create a water-supply scheme for the benefit exclusively of the Waimeha Township, and to define a special rating area for the purpose.

2. That the benefit of the water-supply scheme inaugurated by the Council was confined to lands situated within the boundaries of the special rating area, and to any further areas to which the scheme might be extended.

3. That, as no extension of the scheme had, in fact, been made, it was not open to an owner of land lying partly within and partly without the special rating area to contend that, because he lawfully received a supply of water in respect of one portion of his land, he was at liberty to extend the supply to a contiguous portion lying beyond the area.

*State Advances Superintendent v. Auckland City Corporation and One Tree Hill Borough* ([1932] N.Z.L.R. 1709) and *The King v. Mayor, &c., of Napier* (1907) 26 N.Z.L.R. 917 distinguished.

4. That the Council had acted within its rights and powers in entering upon the plaintiff's land and taking the steps it did to prevent the misuse of its water ; and there was, consequently, no trespass by it.

ACTION in which the plaintiff claimed an injunction to restrain the defendant's Council from trespassing by its servants or agents on his land, from interfering with the water-supply thereon, and from moving or removing any part of his property.

5 No evidence was called at the hearing, the facts (which in substance were not in dispute) being ascertained from the affidavits filed. There was one question of fact originally relied on by plaintiff—namely, an alleged contract between the Council and plaintiff's predecessor in title for a continuous supply of water to plaintiff's land—but the existence of  
10 any such contract was denied, and plaintiff elected not to rely upon it in so far as it might have supported his cause of action.

In 1939, the Council created a water-supply special rating area for that portion of the Te Horo Riding known as the Waimeha Township. Pursuant to the authority of a poll of ratepayers in that area, a loan of £3,300  
15 was raised by the Council under the Local Bodies Loans Act, 1926, the interest and other charges in respect of the loan being secured by a special rate of 2d. in the £ upon the rateable value (on the basis of the capital value) of all the rateable property in the special rating area as defined in the special resolution duly passed for the purpose. The water-supply  
20 was installed, and a special by-law, entitled the Waimeha Township Water Supply By-law, 1939, made and ordained by the Council in relation thereto. An Order in Council had already been issued on December 17, 1929 (*1929 New Zealand Gazette*, 3323), pursuant to s. 182 of the Counties Act, 1920, conferring on the Council all the powers with respect to the  
25 supply of water for domestic or industrial purposes exercisable by a duly constituted Borough Council under specified portions of the Municipal Corporations Act, 1920, and its Amendments. The powers so conferred were those now appearing in the Municipal Corporations Act, 1933, as ss. 82-84, 87, 88, Part XX (with the exception of ss. 251, 253, and 254),  
30 and s. 346.

Plaintiff was the owner and occupier of a block of land (containing in all approximately 6 acres), a small portion of which was within the special rating area and the greater portion of which was outside the area, though within the boundaries of the county. The portion lying within the  
35 special rating area, though only part of the land in the existing certificate of title, was delineated therein as a separate lot on a different deposited plan from that in respect of the remaining land in the title. Plaintiff in fact acquired the whole block by successive purchases between 1943 and 1946, and now held the block in three separate certificates of title.  
40 There was a cottage erected on that portion of the land within the special rating area. On or about October 23, 1942, plaintiff's predecessor in title (one F. C. Wilson) made application to the defendant Council for a permit to make a connection to the water-supply system for an ordinary water-supply in respect of that portion of the land situated within the  
45 special rating area. Pursuant thereto, a permit to make the connection applied for was granted, the permission being expressly limited to an ordinary supply. Notwithstanding this, it appeared to be the case that the connection of water thereupon made in favour of F. C. Wilson not only served a cottage upon his land within the special rating area, but led  
50 to and supplied certain standpipes upon the adjacent land (outside the area), to enable him to water a market-garden then operated by him upon such adjacent land. This additional supply of water would clearly come

within the definition of an extraordinary supply for the purposes of the by-law, though there was no evidence to show how it came to be installed. The affidavits filed by the defendant stated that no agreement had ever been made between it and F. C. Wilson in relation thereto, and that no authority or licence had ever been given to plaintiff or to any other person to make or place any water pipe-line or any stopcock or water toby on the land of plaintiff situated outside the special rating area. Such affidavits further showed that no part of the reticulation on the last-mentioned portion of plaintiff's land had been placed there by the Council. The fact remained that such reticulation (but to the extent only of the standpipes in the market-garden) was in existence at the time of the acquisition of the land by plaintiff, and it seemed to be a fair assumption on the facts that the position in that respect was known to the Council.

The circumstances which had given rise to the present litigation, however, were those connected with the action of plaintiff, in or about the year 1948, in extending the water-supply line from the then existing reticulation to a more distant part of his land on which was erected another dwellinghouse. The purpose of the extension was to provide a domestic supply to such dwellinghouse, which was situated at a considerable distance beyond the boundary of the special rating area. On April 5, 1948, the Council wrote to plaintiff drawing attention to what was called the unauthorized connections outside the special area, and notifying him that a disconnection would be made at the expiration of fourteen days from that date. In spite of plaintiff's protest, the water pipe-line on plaintiff's property was on April 20, 1948, cut by the Council at a point just beyond the boundary of the special area. Plaintiff thereupon re-connected the supply. He continued to make representations to the Council with the object of arriving at some arrangement which would ensure to him the use of the water for his house beyond the special area, but the Council was obdurate in its attitude, and insisted on the disconnection. On March 28, 1949, it again cut the pipe-line at the same point as before, and again plaintiff repaired it. On April 6, 1949, the Council for the third time cut the pipe-line at the same point. Although the affidavits were silent as to what then transpired, the learned trial Judge said that it was to be inferred that plaintiff again repaired it, and that no further steps had so far been taken by the Council to disconnect the supply.

*N. E. Crimp*, for the plaintiff.  
*Shorland and Cullinane*, for the defendant.

*Cwr. adv. vult.* 40

HAY, J. [After stating the facts, as above:] Plaintiff claims that, as he is a "consumer" or "owner" within the meaning of the by-law, he has the right to the use of domestic water—i.e., the ordinary supply—on his property. He contends that there is nothing in the by-law to compel him to consume domestic water on one part only of his property, and submits that the true legal position is that the water is supplied to the consumer for his land, and is available for his use on any part of the land, whether within or extending beyond the limits of the special rating area. He even goes on to contend (if I understand the argument aright) that, where a County establishes waterworks, they are for the benefit of the county as a whole.

In my opinion, those contentions cannot be supported. There is no doubt in my mind as to the power of a County Council to set up a

water-supply for a limited district within the county. Curiously enough, there appears to be nothing in the Counties Act, 1920, conferring such a power in express words. A Council is (by s. 150) given full power and authority to erect, construct, and maintain any public works that, in the opinion of the Council, may be necessary or beneficial to the county, whether or not such works are wholly within the county. Public works for the purposes of that section include any work within the meaning of the Public Works Act, 1928, and, therefore, include any waterwork. It is provided by s. 122 that the Council may from time to time, either in addition to or in lieu of any general rate, make and levy separate rates upon all rateable property within any riding of the county; or it may by special order make and levy any such rate upon all rateable property within such portion of the county as is defined in the special order. Then, in s. 3 (3) of the Local Bodies Loans Act, 1926, it is provided that a local authority may raise a special loan for any authorized purpose for the benefit of some defined part of a district. The clear implication of those provisions is that a public work may be undertaken for the benefit of a defined portion of the county, and on terms that the cost shall be borne by the ratepayers of that portion alone. Here, by way of extension to the foregoing powers, the Council has conferred upon it by the Order in Council certain powers in respect to water-supply exercisable by a Borough Council under the Municipal Corporations Act, 1933. The last-named powers include the power in s. 82 of that Act to make and levy water rates in respect of ordinary supply and extraordinary supply as defined by appropriate by-laws. On the construction of the section, it is, I think, relevant to consider ss. 80 and 81, which clearly recognize the distinction between public works undertaken for the benefit of the district as a whole and those undertaken for the benefit of any defined portion thereof. The conclusion to be drawn from all the relevant statutory provisions is that the Council had full authority to create this water scheme for the benefit exclusively of the Waimeha Township, and to define a special rating area for the purpose.

Having done so, the Council passed the by-law, the validity of which is not challenged in these proceedings. It is expressly provided by the by-law (cl. 2) that it shall apply to all property and premises within the area served by the Council's water-supply scheme, and shall extend to include and embrace any and all further areas that may from time to time be served by any waterworks extensions. It defines the terms "consumer" or "owner" as meaning the person or persons, syndicates, companies, guilds, associations, trustees, or other body of persons acting as owners, or on behalf of the owner or owners, of premises or land within the area embraced by the waterworks and any further extensions that may be made thereto from time to time by the Council. It defines "ordinary supply" as an annual supply to a consumer for use for general domestic purposes, including private washhouses, private water-closets, private urinals, and private baths; and "extraordinary supply" as water used for a purpose other than ordinary supply, including water used for the specific purposes therein enumerated. It provides (cl. 8) that every extraordinary supply shall be terminable by three months' notice in writing given by either side, except in case of a wilful breach of any of the provisions of the by-law, when the Council may waive such notice as in its absolute discretion it shall think expedient or necessary; and that, on the expiration of any such notice, it may enter upon the private premises and cut off the supply. Other provisions of the by-law relevant for present purposes are cl. 24, providing that no person receiving a supply

of water for any particular purpose shall use any part of such supply for some other purpose ; cl. 29, to the effect that no person shall attach any pipe or other fitting to the mains of the Council, or to any pipe or apparatus connected therewith, or make any addition or alteration to or in any water service or apparatus connected therewith, without first having given written notice to the Council and obtained its consent ; cl. 30, requiring a written permit from the Council before the execution of new work, or the alteration or removal of pipes, fittings, or apparatus ; cl. 31, making it lawful for the Council's officer to enter any private house or other building or premises for the purpose of inspection ; cl. 36, providing that the water service of any premises shall not be connected with the service of any other premises save with the written consent of the Council, which may annex any conditions to its consent ; and cl. 53, providing that no person shall in any way interfere with taps, pipes, cocks, meters, or other matters or things connected in any way with the Council's water-supply.

To my mind, it is abundantly clear, from a consideration of the statutory provisions to which I have referred, as well as those of the by-law, that the benefit of the water scheme inaugurated by the Council is confined to lands situated within the boundaries of the special rating area, and to any further areas to which the scheme may be extended. No such extension has in fact been made, and it is, therefore, in my opinion, not open to an owner of land lying partly within and partly without the special rating area to contend that, because he lawfully receives a supply of water in respect of one portion of his land, he is at liberty to extend the supply to a contiguous portion lying beyond the area. It is argued on behalf of plaintiff that, on such a view of the legal position, an anomalous position would arise in the supposititious case of the boundary of a special rating area passing through the curtilage of a dwelling, or even through the building itself. In theory, such a possibility no doubt exists. In practice, a local authority in demarcating a special rating area is guided by common sense, and the possibility is, therefore, remote. It is certainly of no practical importance in the present case, for the reason that the eastern boundary of the special rating area follows the title line of one of the sections owned by plaintiff. What is of importance from the practical point of view is that plaintiff, whilst paying a water rate calculated on the annual value of that portion of his land lying within the special rating area, is taking advantage of the water connection to that land in order to supply a dwellinghouse situated beyond the area. It is true that plaintiff has signified his willingness to pay a reasonable additional charge for the extended supply, but that is beside the point.

A further contention by plaintiff is that, once water has been supplied by a local authority to a particular property, the *status quo* must be maintained. Here, he contends, a supply was originally given to Wilson, his predecessor in title, not only for his residence (lying within the area), but also for his market-garden, outside the area. It is argued that the only provisions in the Municipal Corporations Act, 1933, conferring power to stop a supply once established are s. 87 (in the case of failure to pay the water rate) and s. 248 (in the case of default in providing proper apparatus and keeping in good repair, or wilfully allowing water to run to waste), and that neither of those provisions applies to present circumstances. I cannot agree that the statutory provisions just referred to comprehend all the powers of a local authority with reference to the stoppage of water. It is, in my opinion, within the by-law-making power to make provision for cutting off the water-supply in appropriate circumstances, and that has been lawfully done by the Council in the present instance. There

can be no doubt on the facts of the case that plaintiff has been guilty of a wilful breach of more than one of the relevant clauses of the by-law as summarized above, and, in such circumstances, the Council is empowered, under cl. 8 of the by-law, without notice to enter upon plaintiff's premises and cut off the supply. It is to be noted in that connection that, in the first place, the Council in fact gave notice of its intention in that behalf, and then stopped the supply only to the extent that it came within the category of an extraordinary supply within the meaning of the by-law.

- 10 I have considered the authorities relied on by plaintiff—namely, *State Advances Superintendent v. Auckland City Corporation and One Tree Hill Borough* ([1932] N.Z.L.R. 1709) and *The King v. Mayor, &c., of Napier* (1907) 26 N.Z.L.R. 917—but neither decision appears to me to lend support to plaintiff's case. The proceedings before me are in the form of an application for an injunction to restrain an alleged trespass. In the view I take of the matter, the Council acted within its rights and powers in entering upon plaintiff's land and taking the steps it did to prevent the misuse of its water. There was consequently no trespass; and, in view of that finding, it is not competent for the Court to restrain the Council from doing in the future something it is lawfully entitled to do. The application will accordingly be refused, and judgment will be entered for the defendant.

- In the peculiar circumstances of the case, I do not propose to allow costs against plaintiff, who, by reason of the attitude of the defendant in insisting on its strict legal rights, is subjected to distinct hardship. Whatever may have been the circumstances in which his predecessor in title was permitted for a considerable period to use the Council's water-supply for his market-garden, the fact remains that plaintiff, at the time he acquired the property, was entitled to assume that the Council was not averse to a supply of water for limited purposes being made available for the use of his land contiguous to the portion within the special area. His representations to the Council, couched as they were in conciliatory terms, were not received with that degree of consideration which might have been expected in the circumstances. The Council, according to the correspondence, justified its attitude on the grounds of the increasing demand on its water resources for properties within the special area, to which it owed its first legal duty. Notwithstanding that very proper consideration, there were special reasons applicable to plaintiff's case (which appears to be an exceptional one) such as the provisions of cl. 60 of the by-law were designed to meet.

*Application refused.*

Solicitor for the plaintiff: *N. E. Crimp* (Auckland).

Solicitors for the defendant: *Park and Bertram* (Levin).

## LAMASON v. MCLEAN AND ANOTHER.

SUPREME COURT. Napier. 1952. February 13. FAIR, J.

*Milk—Milk-delivery Licence—Milk Authority attaching Condition requiring Milk Vendor "to have for sale daily sufficient pasteurized milk as is asked for" by Customers—Construction of Condition—Principles of Construction Applicable—Milk Act, 1944, s. 83 (1) (b).*

On November 8, 1950, the Napier Milk Authority, pursuant to a resolution passed by it on November 6, 1950, by a circular notice to all holders of milk-delivery licences in its district, purported to add to the conditions to which such licences were already subject under its by-law. The material part of such circular notice is as follows:

"Circular to All Napier Milk Vendors.

"Amendments to Licences.

"I have to give you formal notice that the Napier Milk Authority has resolved as under:—

"1. That commencing on November 24, 1950, the conditions attached to every Milk Delivery Licence heretofore issued by the Milk Authority for the Napier Milk District shall be added to—

"(a) By requiring the holder of any such license to have in his possession for sale during normal hours of delivery an adequate supply of both pasteurized milk and milk which has not been pasteurized or subjected to a similar treatment and to sell pasteurized milk to every customer who requests to be supplied with pasteurized milk and to sell milk which has not been pasteurized or subjected to a similar treatment to every customer who requests to be supplied with milk which has not been pasteurized or subjected to a similar treatment."

The defendants received a copy of this notice, to which was added a post-script as under:

"P.S. You will note that under 1 (a) you will be required to have for sale daily sufficient pasteurized milk as is asked for by your customers. Failure to comply with this requirement will, in view of your previous total disregard of the Authority's requests, result in legal proceedings being taken against you without further notice."

The defendants, who traded in partnership, were charged under s. 85 (b) of the Milk Act, 1944, that, on December 5, 1950, being the holder of a milk-delivery licence, they failed without lawful excuse to comply with the direction requiring the holder of a milk-delivery licence to have in his possession for sale during the normal hours of delivery an adequate supply of pasteurized milk.

The learned Magistrate dismissed the information. On a general appeal from that determination,

*Held*, 1. That such a condition is to be construed in the same manner as by-laws of local authorities are to be construed—*i.e.*, it is to be given a "benevolent" construction, as opposed to a "strict" construction required in respect of penal or taxation provisions, or provisions of a type that should be precise and exact in the requirements imposed upon the persons who have to observe them; and regard must be given to the assumption that such condition was intended to be reasonable in its terms, and not to require from the persons on whom the duty was imposed conduct or behaviour that it would be unreasonable to ask of them.

2. That the condition attached to the milk-delivery licence required the milk vendor to carry an adequate supply of pasteurized milk; and it meant that on request, which should be made at least on the preceding day, the milk vendor was bound on the next day of delivery to bring the milk that he was asked to bring.

3. That there was no evidence that, on the day named in the information, any of the defendant's customers had requested to be supplied with pasteurized milk, and no evidence from which it could be inferred that the defendants should have anticipated any demand which would have necessitated the carrying of even one bottle of pasteurized milk.

The appeal was accordingly dismissed.

APPEAL by way of case stated under s. 315 of the Justices of the Peace Act, 1927.

- William McLean and Joseph McLean, trading in partnership as milk vendors under the name of McLean Bros., were each charged under s. 85 (b) of the Milk Act, 1944, with the following offence :

On December 5, 1950, being the holder of a milk-delivery licence issued by the Milk Authority for the Napier Milk District did without lawful excuse fail to comply with a direction of the Milk Authority given under the Milk Act, 1944, requiring the holder of a milk-delivery licence to have in his possession for sale during normal hours of delivery an adequate supply of pasteurized milk.

The admitted or proved facts were as follows :

- The Napier Borough Council by Order in Council dated August 14, 1945, was duly appointed the Milk Authority for the Napier Milk District, pursuant to s. 8 of the Milk Act, 1944 (*1945 New Zealand Gazette*, 1025).
- 15 The defendants, under the name of "McLean Bros.," were allotted a milk-delivery zone within the Napier Milk District under the Napier Milk Delivery Scheme, 1940, a scheme duly approved by the Minister of Supply under Reg. 3 of the Delivery Emergency Regulations, 1940 (*1940 New Zealand Gazette*, 2281). This scheme was continued in force by Reg. 4
- 20 of the Milk Delivery Regulations, 1949 (Serial No. 1949/150). By Reg. 9 of the last-mentioned Regulations, no person other than the defendants were permitted to deliver milk in pursuance of a contract of sale in the zone allotted to the defendants.

- Section 83 of the Act empowers a Milk Authority to make by-laws, and the Napier Milk Authority by Special Order made a by-law known as the Napier Milk District By-law, which came into force on April 6, 1948. Pursuant to s. 61 of the Milk Act, 1944, the Napier Milk Authority by Special Order appointed April 6, 1948, as the day from and after which
- 25 no person could lawfully sell milk within its district except under a licence issued by that Authority.

It was common ground that the defendants were at all material times holders of a "milk-delivery licence" issued pursuant to that by-law.

- Section 65 (1) of the Act empowers a Milk Authority, *inter alia*, to grant or renew any such licence, either unconditionally or subject to such
- 35 conditions as the Milk Authority thinks fit, while subs. 2 of that section empowers a Milk Authority from time to time by notice to a licensee to vary, revoke, or add to any such conditions.

- On November 8, 1950, the Napier Milk Authority, pursuant to a resolution passed by it on November 6, 1950, by a circular notice to all
- 40 holders of milk-delivery licences in its district purported to add to the conditions to which such licences were already subject under its by-law. The material part of such circular notice is as follows :

Circular to All Napier Milk Vendors.  
Amendments to Licences.

- I have to give you formal notice that the Napier Milk Authority has resolved as under :—

1. That commencing on November 24, 1950, the conditions attached to every Milk Delivery Licence heretofore issued by the Milk Authority for the Napier Milk District shall be added to—

- (a) By requiring the holder of any such license to have in his possession for sale during normal hours of delivery an adequate supply of both pasteurized milk and milk which has not been pasteurized or subjected to a similar treatment and to sell pasteurized milk to every customer who requests to be supplied with pasteurized milk and to sell milk which has not been pasteurized or subjected to a similar treatment to every customer who requests to be supplied with milk which has not been
- 55 pasteurized or subjected to a similar treatment.



The defendants received a copy of this notice, to which was added a postscript as under :

P.S. You will note that under 1 (a) you will be required to have for sale daily sufficient pasteurized milk as is asked for by your customers. Failure to comply with this requirement will, in view of your previous total disregard of the Authority's requests, result in legal proceedings being taken against you without further notice.

The defendants were charged under s. 85 (b) of the Milk Act, 1944, that, on December 5, 1950, being the holder of a milk-delivery licence, they failed without lawful excuse to comply with the direction requiring the holder of a milk-delivery licence to have in his possession for sale during the normal hours of delivery an adequate supply of pasteurized milk.

The learned Magistrate dismissed the information.

*Sproule*, for the appellant.

*Fabian*, for the respondents.

FAIR, J. (orally). The question involved in this appeal is one of some general importance, inasmuch as it determines the conditions upon which the suppliers of milk in the city of Napier are to carry on their delivery. The prosecution was founded upon conditions attached to the milk-delivery licence held by the defendants, and the first question really should be the determination of the meaning of that condition.

I agree with Mr. *Sproule's* submission that such conditions are to be construed in the same manner as by-laws of the local authorities are held to be entitled to be construed. Such by-laws have to be given what is called a "benevolent" construction, as opposed to the "strict" construction required by logic and common sense as well as by the law in respect of penal or taxation provisions or provisions of a type that it is right and proper should be precise and exact in the requirements imposed upon the persons who have to observe them. By-laws are generally in a different category, because they have to apply to a variety of conditions and numberless variations of the circumstances in which they have to be carried out, and so, with regard to this condition, the Court should, I think, give it a benevolent construction, as the term is, not scrutinizing its language too closely, but construing it as intended to effect the purpose for which it is designed.

The Court has, of course, the power within certain limitations to modify and extend the literal meaning of words when it is quite clear what the general intention is. But, on the other hand, in construing a by-law, the Court also has to have regard to the fact it has always to be assumed that a by-law enacted by a local authority was intended to be reasonable in its terms, and not require from the persons on whom the duty was imposed conduct or behaviour that it would be unreasonable to ask of them. That is the way in which this condition has to be construed, and I doubt whether the limited construction contended for by the counsel for the Borough, and to some extent apparently acted upon by the Magistrate, is a sound view.

I think the reasonable construction of the condition does not impose on the respondents so strict a duty as the Magistrate assumed in his judgment in this respect. The language of the condition requires the vendor to carry an adequate supply of both pasteurized milk and non-pasteurized milk. But the condition goes on to say : "and to sell pasteurized milk to every customer who requests to be supplied with pasteurized milk" and to sell milk which has not been pasteurized . . . to every

"customer who requests [that]." That provision the Magistrate has assumed, adopting the submissions of Mr. *Sproule*, to require him always to carry supplies of both, to be handed over to a customer immediately it is required. It does not seem to me that that is the intention of the condition when read carefully; and that it would be unreasonable, if a milk vendor had been supplying, we will say, 10 gallons of pasteurized milk and 100 gallons of unpasteurized milk on a Tuesday, that it would be an offence if, on a Wednesday, the customers suddenly said that they wanted to change over from unpasteurized to pasteurized and he did not have an adequate supply because he had only the 10 gallons he anticipated, and he therefore could not supply, perhaps, the additional 20 gallons that these erratic customers requested.

It seems to me unreasonable to construe a condition in such a way that a failure to be able to comply with an immediate request, without warning, for one kind of milk rather than another should constitute an offence, and so I think that all that the condition was intended to require was that, upon request, they should be supplied, but not necessarily immediately on the day of the request. Common sense seems to point to the milk vendor at least having a day's notice, and what the Court thinks this condition means is that, upon request, which should be made at least on the preceding day, he is bound on the next day of delivery to bring the milk that he is asked to bring. But the other seems to me an unreasonable construction, and should not, I think, be adopted.

Turning to the evidence: the Magistrate has held that there is no evidence that on the day in question this request was made by any of the customers, and I think that that is the fair reading of the evidence. This is a charge which subjects the person charged to liability to a penalty of £100, and the ordinary rule as to evidence applies—namely, that there must be evidence proving the offence has been committed, and, as in all criminal cases, proving without reasonable doubt, before a defendant can be convicted. Here, there may be, as the Magistrate says in his judgment, good ground to believe that they refused on former occasions to supply, and so committed a breach of the condition. Whatever view is taken as to its construction, if at some earlier date they committed that offence, having been asked on one day to supply on the following day a different class of milk, then that offence has to be proved. The fact that on this particular day they had no milk in their cart does not prove either that on that day they failed to carry an adequate supply to sell it to a customer who requested to be supplied with it the previous day, or at any previous time asked for delivery on December 5, or even that they did not carry an adequate supply to supply pasteurized milk to a customer who asked for it on that day. There is no evidence that any customer asked for it. There is no sufficient evidence to justify an inference that a customer is likely to have asked for it on that day, and so it appears to the Court that the Magistrate was right in his finding on fact and applied the law correctly to this particular case, and, consequently, the appeal must fail.

On the question of costs, the ordinary rule must apply. £8 8s. costs should be allowed.

*Appeal dismissed.*

Solicitors for the appellant: *Lusk, Willis, Sproule, and Woodhouse* (Napier).

Solicitors for the respondents: *Mason, Dunn, and Fabian* (Napier).

## WONG v. NORTHCOTE BOROUGH.

SUPREME COURT. Auckland. 1952. March 26; April 30. F. B. ADAMS, J.

*Town-planning—Consent of Local Authority to Proposed Building—Refusal of Consent based on Local Authority's Opinion that Such Building in Contravention of Town-planning Principles—Such Refusal in Council's Discretion although No Town-planning Scheme prepared or approved—Decision Conclusive in absence of Bad Faith—Decision of Town-planning Board, on Appeal from Such Decision, Conclusive to Same Extent—"Town-planning principles"—Town-planning Act, 1926, s. 34.*

Where, under a statute or a by-law, the consent of a local authority is necessary to any building or work, the local authority may invoke s. 34 of the Town-planning Act, 1926, at any time before it has prepared and had approval of a town-planning scheme. It may base its decision under that section upon any or all of the three grounds mentioned in the section; but it ought at once to make clear to the person or persons affected exactly what its decision is. The decision is conclusive in the absence of bad faith on any question relating to the principles of town-planning; and, in the event of an appeal from it, the decision of the Town-planning Board is conclusive to the same extent.

*Moubray v. Mayor, &c., of Takapuna* ([1929] N.Z.L.R. 99) and *Fenton v. Auckland City Corporation* ([1945] N.Z.L.R. 768) applied.

On August 15, 1951, a builder, acting on behalf of plaintiff, lodged with the Northcote Borough Council a written application for a permit, accompanied by plans and specifications. Endorsed on the application form was a statement to the effect that permits were necessary for the erection, &c., of any building whatsoever.

Plaintiff's property was a parallelogram measuring 40 ft. on the Queen Street frontage and 100 ft. on the Duke Street frontage, the angle formed by the two frontages being slightly less than a right angle. The proposed buildings comprised a small laundry shop and store fronting Queen Street, integral with a dwelling at the rear fronting Duke Street and, some distance from this dwelling, a garage and a small laundry. No suggestion was made that the defendant's requirements would prevent plaintiff, by some reasonable modification of his plans, from using the property for his intended purposes, though the vacant spaces available around and between buildings might be reduced.

On September 27, 1951, in pursuance of a resolution of the Council passed on September 12, 1951, and in accordance with its terms, it was intimated to plaintiff that the necessary permission would be given provided the buildings were set back 10 ft. from the Queen Street frontage and that buildings or growth were kept clear of a further triangular area 10 ft. by 10 ft. on the Duke Street corner behind the 10 ft. set back. This was treated as an implied refusal of the permit except upon those conditions; and the subsequent conduct of the Council showed that it was so intended. It was not suggested that the setting back of the shop on the Queen Street frontage would adversely affect plaintiff's business; but, while nothing had been particularized, the requirements no doubt involved detriment to plaintiff.

The defendant Council sought to justify the refusal of the permit by reference to s. 34 of the Town-planning Act, 1926. It was common ground that no by-law of the Council was infringed by the plans or specifications, and no suggestion was made that they contravened any statutory prohibition or requirement.

In an action claiming a writ of mandamus commanding the Council to issue a permit for the buildings and an injunction restraining it from imposing certain conditions on the permit,

*Held*, 1. That the word "scheme" in the phrase "at any time before the scheme has been approved" in s. 34 (1) of the Town-planning Act, 1926, as amended, is the scheme which the local authority is under obligation to prepare or has resolved to prepare—a concrete scheme if one has been prepared, but, if none has been prepared, the scheme which will come into existence when the

obligation is performed or the resolution implemented ; and the phrase covers the period of time from the date when the obligation is imposed or the resolution is passed down to the final approval of a scheme.

*Wells v. Newmarket Borough Council* ([1932] N.Z.L.R. 50), *Mount Eden Borough v. N.Z. Wallboards, Ltd.* ([1945] N.Z.L.R. 711), and *Fenton v. Auckland City Corporation* ([1945] N.Z.L.R. 768) distinguished.

2. That, at least to the extent indicated in the judgment, a local authority may rely on s. 34, even though it has not yet prepared, or begun to prepare, a scheme ; and its decisions thereunder need not have reference to any particular or ascertainable scheme.

*James v. Waimairi County Council* ([1929] N.Z.L.R. 449) and *New Zealand Breweries, Ltd. v. Auckland City Corporation* ([1938] N.Z.L.R. 428) referred to.

3. That the Council, having in fact acted in pursuance, or intended pursuance, of s. 34, was at all times entitled to rely on that section, even though its resolution of September 12, 1951, made no reference to the Town-planning Act, 1926, and that statute was not mentioned in correspondence by it or on its behalf until the statement of defence was filed.

*Jones v. Public Trustee* ([1931] G.L.R. 475) referred to.

4. That it was open to the Council, in the exercise of the discretion conferred on it by s. 34, to say that in this case town-planning principles required that the building should be set back and the triangular area kept clear as provided in the Council's resolution.

5. That, on the facts, the Council had acted in good faith—namely, it had exercised the power conferred on it by s. 34 for its proper purposes, and not on improper or extraneous considerations ; and the plaintiff's only remedy, in the circumstances of the case, was by way of appeal to the Town-planning Board.

ACTION claiming a writ of mandamus commanding the defendant's Council to issue a permit for the erection of certain buildings and an injunction restraining it from imposing certain conditions on the permit. At the hearing, the defendant waived its allegation that no notice of action  
5 had been given, and admitted the allegations contained in paras. 1 and 3 of the statement of claim.

The property in question was situated at the corner of Queen and Duke Streets in the Borough of Northcote, the former being the main thoroughfare of the Borough, 66 ft. in width, and Duke Street being 30 ft. in width.

10 On August 15, 1951, a builder, acting on behalf of plaintiff, lodged with the Council a written application for a permit, accompanied by plans and specifications. Endorsed on the application form was a statement to the effect that permits were necessary for the erection, &c., of any building whatsoever ; but no by-law was put in, nor was any other evidence  
15 tendered to show that the defendant had any power under any by-law to grant or refuse a permit. The learned Judge said that he would, if necessary, allow the omission to be supplied, but that in the meantime it would suffice to proceed on the assumption that there was a by-law prohibiting plaintiff from erecting buildings without defendant's consent.

20 Plaintiff's property was a parallelogram measuring 40 ft. on the Queen Street frontage and 100 ft. on the Duke Street frontage, the angle formed by the two frontages being slightly less than a right angle. The proposed buildings comprised a small laundry shop and store fronting Queen Street, integral with a dwelling at the rear fronting Duke Street, and, some  
25 distance from this dwelling, a garage and a small laundry. No suggestion was made that the defendant's requirements would prevent plaintiff, by some reasonable modification of his plans, from using the property for his intended purposes, though the vacant spaces available around and between buildings might be reduced.

On September 27, 1951, in pursuance of a resolution of the Council passed on September 12, 1951, and in accordance with its terms, it was intimated to plaintiff that the necessary permission would be given provided the buildings were set back 10 ft. from the Queen Street frontage and that buildings or growth were kept clear of a further triangular area 10 ft. by 10 ft. on the Duke Street corner behind the 10 ft. set back. This was treated, the learned Judge thought, rightly, as an implied refusal of the permit except upon those conditions, and the subsequent conduct of the Council showed that it was so intended. It was not suggested that the setting back of the shop on the Queen Street frontage would adversely affect plaintiff's business; but, while nothing had been particularized, the requirements no doubt involved detriment to plaintiff.

*Ennor*, for the plaintiff.  
*Smytheman*, for the defendant.

*Cur. adv. vult.* 15

F. B. ADAMS, J. [After setting out the facts, as above:] It was common ground that no by-law of the defendant Council is infringed by the plans or specifications, and no suggestion was made that they contravene any statutory prohibition or requirement. Mr. *Ennor* referred me to the passage in the judgment of *Ostler, J.*, in *Quinlan v. Mayor, &c., of Wellington* ([1929] N.Z.L.R. 491) where he said: "It has been decided by the House of Lords that the only ground upon which a local authority can legally refuse a permit to build is that its by-laws or some statutory requirement has not been complied with: see *Robinson v. Barton-Eccles Local Board* (8 App. Cas. 798) . . . If the applicant has complied with all the requirements laid down in the authority's own by-laws, and has not contravened any statutory prohibition or requirement, the local authority has no general discretion to refuse to grant the permit, and cannot refuse on the ground that it requires the land" (*ibid.*, 495, 496).

But *Ostler, J.*, is not to be understood as meaning that statutes and by-laws cannot be so framed as to confer a general discretion. The possibility of an absolute power was, indeed, expressly recognized by Lord Selborne, L.C., in *Robinson v. Barton-Eccles Local Board* ((1883) 8 App. Cas. 798, 802, 803). That case turned on the construction of particular by-laws, and the question must always be primarily one of the construction of any relevant statutes or by-laws. As to Mr. *Smytheman's* contention that the passage quoted above was *obiter dictum* and *per incuriam*, in that no reference was made to the Town-planning Act, 1926, there was in that case no suggestion that the Wellington City Corporation was acting, or could in the circumstances act, under that statute. As *Smith, J.*, pointed out in *Downs and Poole, Ltd. v. Upper Hutt Borough Council* ([1950] G.L.R. 240, 244), neither *Quinlan's* case ([1929] N.Z.L.R. 491) nor *Mowbray v. Mayor, &c., of Takapuna* ([1929] N.Z.L.R. 99) was concerned with the power of a local authority to refuse its consent in absolute form under s. 34.

In the present case, the defendant sought to justify the refusal of the permit by reference to s. 34 of the Town-planning Act, 1926, and the argument centred round that section. As amended by s. 5 of the Town-planning Amendment Act, 1929, it reads as follows:

(1) Any local authority that by this Act or by Order in Council under this Act is under an obligation to prepare a town-planning scheme or an extra-urban planning

scheme, and any local authority that, not being under an obligation to prepare a scheme as aforesaid, has resolved, pursuant to section thirteen or to section twenty-five of this Act, to prepare a scheme, may at any time before the scheme has been approved by the Town-planning Board absolutely or conditionally refuse its consent to the erection of any building or the carrying-out of any work within its district, or may definitely prohibit the erection of such building or the carrying-out of such work, if it appears to such local authority that the erection of such building or the carrying-out of such work would be in contravention of the scheme if it had been completed and approved, or would be in contravention of town-planning principles, or would interfere with the amenities of the neighbourhood.

(2) Any person injuriously affected by any determination of a local authority under this section may appeal from that determination to the Town-planning Board.

(3) The determination of the Town-planning Board for the purposes of this section on any question relating to principles of town-planning shall be conclusive and shall bind the local authority.

It was proved in evidence that in 1926, when the Act was passed, the population of the Borough exceeded 1,000. Section 13 imposed on every such borough an obligation to prepare a town-planning scheme before January 1, 1930. The arbitrary provisions of s. 34, which were obviously not designed to form part of our permanent legal structure, were thus intended to be confined within a limit of time comprising a period of a little more than four years, with such additions as might be necessary in particular cases for approval of schemes. In 1929, the date specified in s. 13 was advanced to January 1, 1932, and in 1931 to January 1, 1937, at which point it still stands. The defendant Council—and it is far from being alone in this respect—has not yet prepared or submitted any town-planning scheme; and the vague powers conferred by s. 34 have now hung over the heads of its citizens for more than a quarter of a century, and are likely to do so for years to come. But the wisdom of this is for the Legislature, and the Court is concerned only with the interpretation and enforcement of the section.

Mr. Ennor argued that, before a local authority can rely on s. 34, there must be something more than a mere obligation to prepare a scheme or a mere resolution to do so, and that the section can operate only for the protection of a scheme which has been prepared. None has as yet been prepared in the case of this Borough. He relied on the words "at any time before the scheme has been approved," which grammatically govern all that follows in subs. 1. In my opinion, the "scheme" referred to in that phrase is the scheme which the local authority is under obligation to prepare or has resolved to prepare—a concrete scheme if one has been prepared, but, if none has been prepared, the scheme which will come into existence when the obligation is performed or the resolution implemented. The phrase covers the whole period of time from the date when the obligation is imposed or the resolution is passed down to the final approval of a scheme. It is unnecessary to decide whether Mr. Ennor is right in his incidental submission that there must be a scheme already prepared before a local authority can act on the first of the three grounds specified in the subsection—*viz.*, on the ground that the proposed work "would be in contravention of the scheme if it had been completed and approved." Neither *Wells v. Newmarket Borough Council* ([1932] N.Z.L.R. 50), nor *Mount Eden Borough v. N.Z. Wallboards, Ltd.* ([1945] N.Z.L.R. 711), nor *Fenton v. Auckland City Corporation* ([1945] N.Z.L.R. 768) is in point, as there was in each of those cases a scheme prepared and submitted for approval. But, even if the words "in contravention of the scheme" must be read as referring to a scheme already prepared, they do not, in my opinion, affect the meaning of the earlier phrase. The period of time "before the scheme has been approved" includes the period before

it has been prepared; and in that period a local authority is entitled to act at least on the second and third of the specified grounds—*viz.*, contravention of town-planning principles and interference with amenities. Where it is a matter of contravention of town-planning principles or interference with amenities, there is no reference to any prepared scheme; and, with regard to those matters, the words "at any time before the scheme" has been approved" can quite well include the period that elapses before the local authority has prepared a scheme. Such period is plainly within the words, and there is nothing to compel a contrary interpretation. I think, therefore, that, at least to the extent indicated, a local authority may rely on s. 34 even though it has not yet prepared or begun to prepare a scheme, and its decisions thereunder need not have reference to any particular or ascertainable scheme.

The corresponding but different words of the original enactment were construed in *James v. Waimairi County Council* ([1929] N.Z.L.R. 449), by *Adams, J.*, in the Court below (*ibid.*, 451) and by *Herdman, A.C.J.*, and *Kennedy, J.*, in the Court of Appeal (*ibid.*, 456), as including the whole period of time between the commencement of the Act and the approval of a scheme; and, in my opinion, the section in its amended form covers similarly the whole period from its enactment until a scheme has been approved. In *New Zealand Breweries, Ltd. v. Auckland City Corporation* ([1938] N.Z.L.R. 428), *Callan, J.*, treated the section as being applicable in a case where, although considerable progress had been made towards the completion of a scheme, it was still incomplete and had not been submitted for approval.

In the present case, the defendant relies, not on contravention of any scheme, but on contravention of town-planning principles and/or interference with amenities. The main stress was laid on town-planning principles, but the matter of amenities was also mentioned.

I am satisfied on the evidence that the Council did in fact act in pursuance, or intended pursuance, of s. 34, though its resolution of September 12, 1951, made no reference to the Town-planning Act, 1926, nor was the Act otherwise mentioned in writing by or on behalf of the Council until the statement of defence was filed. But Mr. *Ennor's* letter of October 29, 1951, written four days before these proceedings were commenced, shows that the Town-planning Act, 1926, had been under discussion between the solicitors. In the case of an arbitrary power such as is given by s. 34, and particularly in view of the fact that reliance on this power gives rights in respect of compensation which the property owner may not possess in other circumstances, it is desirable that a local authority should disclose frankly the grounds on which it is acting and the statutory provision on which it relies. I do not suggest that there was any attempt at concealment in this case, but it is a matter for comment nevertheless. The person affected by such a decision should not be left for a moment in the dark, nor be allowed, even by silence and unintentionally, to come under any misapprehension as to his rights. However, in this case the plaintiff, with the aid of his solicitor, became acquainted with the relevant enactment, and, in my opinion, as a matter of law, the Council, having in fact acted in pursuance of s. 34, was at all times entitled to rely on the section, even though it had not previously been mentioned. In *Jones v. Public Trustee* ([1931] G.L.R. 475, 477), *Sir Michael Myers, C.J.*, expressed a doubt whether the resolution there in question would have been valid "if it purported to be made" (*ibid.*, 477) under s. 34. But no opinion was expressed, and I do not think that the learned Chief Justice intended to convey the meaning



that, in order to be valid, a resolution must "purport" on its face to be so made. The resolution was in fact one that could not possibly be justified by reliance on s. 34.

- The position accordingly is that the Council is entitled to succeed if it
- 5 has acted with the power or jurisdiction conferred on it by s. 34 and has acted in good faith: *Mowbray v. Mayor, &c., of Takapuna* ([1929] N.Z.L.R. 99) and *Fenton v. Auckland City Corporation* ([1945] N.Z.L.R. 768). Good faith in this connection requires that the power be exercised for its proper purposes, and not upon extraneous and improper considerations.
- 10 There is nothing in the material before the Court to suggest that the Council has acted for any improper purpose, or in bad faith in any other sense, and the sole question is, therefore, whether it has acted within the power. As the matter can be dealt with by reference to town-planning principles, "amenities" need not be discussed.
- 15 Now, it appears to me that the Court cannot discover for itself what are "town-planning principles." In its original form, the section spoke of "recognized and approved principles of town-planning." Something might perhaps be allowed by way of judicial notice, but what is "recognized and approved" could be, and would have to be, ascertained by
- 20 evidence. In its present form, the section contains no words so clearly contemplating reliance on such evidence. But, without it, the Court is helpless, and I am prepared to assume that, if the Court is called upon to ascertain or apply "town-planning principles," it must be guided by expert testimony on the subject. Evidence of this character was adduced,
- 25 and was uncontradicted. In so far as it may be a matter for the Court to decide, I hold that it was open to the defendant Council to say that, in this case, town-planning principles required that the building should be set back and the triangular area kept clear as provided in the Council's resolution. Whether the Court would itself regard these things as
- 30 necessary in the particular circumstances is not the question, and no opinion is expressed; but it seems to me that town-planning principles, taken at their minimum, must include the fixing of building lines in important thoroughfares, and the clearance of corners in such thoroughfares, particularly where narrow streets debouch into them. The evidence
- 35 fully supports this view.

- I doubt, however, whether it is within the province of the Court to form any judgment as to town-planning principles, so long, of course, as the bounds of reason are not over-passed. The power is given "if it
- 40 "appears to such local authority that the erection of such building or the "carrying-out of such work . . . would be in contravention of town-planning principles." The discretion is entrusted, not to the Court, but to the local authority; and I think the statute means what it says in this respect. Moreover, there is a right of appeal under subs. 2 to the Town-planning Board, and subs. 3 makes the determination of that Board
- 45 conclusive for the purposes of the section "on any question relating to "principles of town-planning." In my opinion, the intention of the statute is that such principles are to be ascertained in the first place by the local authority (by way of determinations in respect of particular buildings or works: *Downs and Poole, Ltd. v. Upper Hutt Borough*
- 50 *Council* ([1950] G.L.R. 240, 242))—and on appeal are to be similarly and conclusively determined by the Town-planning Board; and, beyond such powers as may be necessary to ensure decision in good faith, I do not think the Court has any jurisdiction to ascertain or determine the principles of town-planning.



I think also that Mr. *Smytheman* is right in his contention that the plaintiff's only remedy in the circumstances of the case is by way of appeal to the Town-planning Board. I need not discuss the numerous authorities he cited on that subject, and desire only to guard myself against being understood as meaning that certiorari and other extraordinary remedies are wholly excluded by the existence of the right of appeal. While *Yewen v. Terrill* ((1950) G.L.R. 517) was affirmed in the Court of Appeal (unreported), the Judges there did not adopt the view that the right of appeal given by the Transport Act, 1949, was an exclusive remedy.

It follows that plaintiff fails, and the claim is dismissed accordingly. The question of costs is reserved. I have referred to the arbitrary nature of the powers given by s. 34, and, as this seems to be the first occasion on which the Court has had to consider the validity of a local authority's decision based solely on the principles of town-planning without reference to any scheme, complete or incomplete, the defendant Council may perhaps feel that the penalty of costs should not be added to any other misfortune which the plaintiff may suffer by reason of its decision. "Town-planning principles" are so vague and uncertain, and, as the evidence shows, so flexible or fluid—changing not only from place to place but also from year to year—that a decision based thereon is a bitter pill to swallow. As the expert witness said :

There is no code ; there is no standard laid down by law or in any other way . . . other than the practice evolved to meet the circumstances and conditions . . . The town-planning principles . . . accepted to-day are different from principles of twenty or thirty years ago.

It savours of tyranny where any public authority is invested with a power so vague as this, and matters of the kind in question in this case are capable of being dealt with, and are generally dealt with, by specific legislation in the form of by-laws. While I consider that there is no abuse in this case, the powers given by s. 34 are susceptible of grave abuse ; and it is of the essence of "the rule of law" that the rights and duties of citizens should be clearly defined, and not left to the discretion of public officials or bodies.

*Mandamus refused.*

Solicitors for the plaintiff : *Glaister, Ennor, and Kiff* (Auckland).  
Solicitors for the defendant : *Hubble and Tanner* (Auckland).

[IN THE LAND VALUATION COURT.]

## BARBER v. MANAWATU-OROUA RIVER BOARD.

LAND VALUATION COURT. Palmerston North. 1951. December 13. 1952.  
April 29; May 16. ARCHER, J.

*Public Works—Claim for Compensation for “damage done”—Claim to be brought within Twelve Months after Execution of Works out of which Claim arose—Time running from Completion of One Portion of Total Work where Damage complained of caused by Such Portion—“Thereon”—Public Works Act, 1928, s. 45.*

A claim in pursuance of s. 45 (1) of the Public Works Act, 1928, not for “lands taken”, but for “damage done”, must be made within twelve months after the execution of the work out of which the claim has arisen, or within such extended period (up to a maximum of five years) as may have been allowed under s. 63 of the Statutes Amendment Act, 1939.

Section 45 (2) is intended to make it clear that a claim arising out of one clearly defined portion of an undertaking cannot be indefinitely delayed pending the completion of the undertaking as a whole, and to provide that, where damage complained of is caused by one portion of a total work, the twelve-months' limitation runs from the completion of that portion of the work. The latter part of the subsection covers the case where minor additions or adjustments are still required after the portion of the work which caused the damage has been substantially completed. In such a case, that portion of the work is deemed to be completed when anything further that may have to be done “thereon” to finish the same will have no effect either to increase or lessen the damage complained of, as the use of the word “thereon” indicates that the only further work to which the phrase relates is work on that portion of the work which caused the damage; and the fact that some other work may have been done (not on the portion of the work which caused the damage) to reduce or remedy the damage does not extend the statutory period within which a claim may be made.

On an application of the foregoing interpretation of s. 45 (2) of the Public Works Act, 1928, to the facts of the present case, the Court held that the claim for compensation for the loss of land by erosion and for consequential damage to the claimant's property as the alleged result of works undertaken by the defendant Board was out of time, and the Court had no jurisdiction to consider the claim.

*O'Brien v. Minister of Public Works* (1910) 29 N.Z.L.R. 476 and *Farrelly v. Pahiatua County Council* ((1903) 22 N.Z.L.R. 683) applied.

ACTION claiming compensation under the Public Works Act, 1928, for the loss of land by erosion and for consequential damage to the property of the claimant as the alleged result of works undertaken by the Manawatu-Oroua River Board on the Manawatu River in the vicinity  
5 of the claimant's land.

Public Works Act, 1928, s. 45. (1) No claim for compensation under this Act or any former Act relating to public works shall be made (in respect of any lands taken) after a period of five years after the date of the Proclamation taking the said lands, or (in respect of any damage done) after a period of twelve months after the execution of the works out of which such claim has arisen or may hereafter arise; and all right and title to any compensation in respect of such lands or for damage arising out of the execution of such

works, as the case may be, shall after such respective periods absolutely cease.

(2) For the purposes of this section the term “execution of the works” means the completion of the construction of any portion of a work where such portion in itself (and without reference to any other part of the work) causes the damage; and such portion of the work shall be deemed to be completed when anything further that may be required to be done thereon to finish the same will have no effect either to increase or lessen the damage.

In the area concerned, the river was slow-flowing, and followed a winding course through low-lying country, which had originally been swamp, but was now valuable pasture land. The general direction of the river in this area was from north to south, but, before the works undertaken by the River Board, its course diverged first to the left and then to the right in two deep bends, giving the river the appearance of an S, but with its lobes reversed. The two bends were known respectively as Coley's Bend and Barber's Bend, by reference to the owners of adjoining land. Coley's Bend was considerably deeper than Barber's Bend, presumably on account of the land's being lower on that side. The habit of the river was said to be to develop such bends and to extend them by erosion at the apex of the bend, with the possibility that the river might ultimately break out of the bend and find a new course. Coley's Bend had long been recognized as a danger point, and the course of the river there had changed considerably from time to time.

Barber's Bend, which was immediately below Coley's Bend and formed the lower lobe of the S, was less extensive than Coley's Bend, and erosion at the apex of the bend had not been so rapid or appeared so potentially dangerous as in Coley's Bend. There was, however, some degree of erosion in Barber's Bend, and the danger of more serious erosion was always present.

The River Board was set up to control the river and to obviate as far as possible the risk of damage from flooding and erosion. The necessity for action in the vicinity of Coley's Bend was impressed on the Board in 1929 by residents of the Makerua district whose property was endangered by the threatened break-out of the river at that point. It did not appear that at this time any immediate danger was apprehended at Barber's Bend. For the purpose, primarily, of protecting the Makerua, a scheme was prepared by a Mr. Hay for straightening the course of the river by eliminating both Coley's Bend and Barber's Bend. It was hoped thereby to provide a comparatively safe and "non-erodable" course for the river. The expert evidence indicated that the scheme was sound in conception, and that, if it had been effectively carried out, it might have been expected to achieve its objects.

The further facts are sufficiently indicated in the judgment.

G. I. McGregor, for the claimant.

Yorlt, for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by

ARCHER, J. This claim relates to the "works" undertaken by the Board, and the Board's principal defence is that the claim is out of time. It is therefore necessary for us to refer in some detail to the various operations undertaken by the Board since 1929. Considerable *viva voce* evidence was given concerning these operations, and we have been able to peruse a file of relevant extracts from the minutes of the Board. We have also perused the evidence given before the Committee, and have had the benefit of a detailed and careful résumé of the facts found by the Committee and set out in its decision. It will be seen from a comparison of the Committee's decision with that of the Court that we have arrived at somewhat different conclusions as to essential facts and the proper interpretation to be placed upon them. We do not propose, however, to review the Committee's findings in detail, but only to set out our view of the facts as we find them.

The first operations relevant to this claim were undertaken in 1930 for the benefit of the Makerua district, which, for purposes of finance, was declared a separate rating area and rated accordingly. The work done at that time was that recommended by Mr. Hay, and was intended to

5 divert the river through two cuts, the first to eliminate Coley's Bend (which we shall refer to as the No. 1 cut) and the second to eliminate Barber's Bend (which we shall refer to as the No. 2 cut). Some confusion is apparent in the minutes of the Board, as Mr. Hay originally numbered the cuts in the reverse order, but in later years, and in the later

10 minutes of the Board, the cuts have been described in the manner which we propose to adopt. The method of diverting the river recommended by Mr. Hay was that of digging small pilot channels along the line of the proposed cuts, in the hope that the river would scour the channels and make them its regular course. The work undertaken in 1930 was limited

15 to the construction of pilot channels for the two proposed cuts. Unfortunately, the scheme failed, for the river continued in its old course and blocked up the new channels with silt. Between 1931 and 1933, sporadic efforts were made to divert the river into the pilot channels, but these efforts were unsuccessful, and no further work was done on the

20 diversion project until 1940.

The Board's minutes make no reference whatever to the project from 1933 until 1938, when it was discussed at a conference of bodies interested in drainage and flood prevention. The next step was that the Board decided in 1940 "to deepen the Taupunga Cut". Although the minutes

25 indicate some confusion in the numbering of the cuts, the weight of evidence supports the view that the work undertaken in 1940 related solely to what we now term the No. 1 cut. The work consisted of widening and deepening the pilot channel made in 1930 and removing a layer of clay which had prevented natural scouring. This work was

30 completed in 1940, and water then commenced to flow through the No. 1 cut. Further widening and deepening was done from time to time, and the river assisted by scouring the channel, until, by 1943, the main flow of the river was through the No. 1 cut, and Coley's Bend was comparatively free from water save in times of flood. In so far as the work was

35 undertaken to protect the Makerua from a break-out through Coley's Bend, it appears by 1944 to have attained complete success.

During this period, the pilot channel for the No. 2 cut could still be traced, although substantially silted up, but nothing was done with a view to opening the No. 2 cut or making it effective. It seems clear, however,

40 that Mr. Barber had been consulted before the opening of the No. 1 cut, and had been assured that the No. 2 cut would be opened in due course for the protection of his property. In April, 1942, Mr. Barber requested the Board to proceed with this work, but still nothing was done. In October, 1943, Mr. Barber again requested the opening of the No. 2 cut,

45 and pointed out that the diversion of the river through the No. 1 cut was endangering his property by erosion at a point lower down than the original Barber's Bend. It was then clear that the diversion had removed the danger of erosion in the original bend but had created a new area of erosion some chains lower down the river. The apex of the original bend

50 has now silted up and formed some 12 acres of "accretion" land adjoining the Barber property. As a result of Mr. Barber's letter, the Board decided in 1943 to take steps to open the No. 2 cut, and a further letter from Mr. Barber's solicitors elicited a reply from the Board that the matter was being attended to. A contract for this work was let in

55 February, 1944, but the contractors were unsatisfactory, and the work

was still uncompleted in 1946, when it had to be taken over by the Board. Further work was done on the No. 2 cut from time to time, and attempts were made by the use of groynes to divert the river into it. These efforts continued until 1948, but were in the main unsuccessful, though the cut was kept open and carried a limited flow of water. Since 1948, and as a result of the intervention of the Catchment Board, work on the No. 2 cut has been suspended or abandoned, and rock protection work has been adopted as an alternative for the protection of Mr. Barber's land.

In the meantime, the erosion complained of by the claimant in 1943 was continuing and assuming serious proportions. His solicitors wrote in July, 1946, alleging negligence on the part of the Board and notifying the Board that damages would be claimed. In October, 1947, Mr. Barber requested further action to make the No. 2 cut effective, and the Board replied acknowledging that further work would have to be done. On March 12, 1950, the solicitors wrote making a claim for £2,835, described as special damages for the negligent execution of the river diversion. The threatened action, however, was not commenced, but on August 15, 1950, a claim was made under the Public Works Act, 1928, for the sum of £5,730 in respect of lands injuriously affected by the diversion of the river. The claim was reduced before the Committee to £4,213, and the Committee awarded the claimant £1,234.

From this award the Board appeals, both as to amount and on the ground that the claim was out of time. The claimant cross-appeals, on the ground that the sum awarded was too low. The substantial issue, and the only one which we have found it necessary to consider, is that relating to the statutory limitations upon the time within which claims for compensation under the Public Works Act, 1928, may be made. The relevant provisions are found in s. 45 of the Act, which reads as follows:

(1) No claim for compensation under this Act or any former Act relating to public works shall be made (in respect of any lands taken) after a period of five years after the date of the Proclamation taking the said lands, or (in respect of any damage done) after a period of twelve months after the execution of the works out of which such claim has arisen or may hereafter arise; and all right and title to any compensation in respect of such lands or for damage arising out of the execution of such works, as the case may be, shall after such respective periods absolutely cease.

(2) For the purposes of this section the term "execution of the works" means the completion of the construction of any portion of a work where such portion in itself (and without reference to any other part of the work) causes the damage; and such portion of the work shall be deemed to be completed when anything further that may be required to be done thereon to finish the same will have no effect either to increase or lessen the damage.

Provision for an extension of the prescribed time is made by s. 63 of the Statutes Amendment Act, 1939, which reads as follows:

The period of twelve months after the execution of the works allowed by section forty-five of the principal Act for the making of any claim for compensation in respect of damage done may, on application made either before or after the expiration of that period, be extended by a Judge of the Supreme Court, upon or subject to such conditions as he thinks fit, to such period, not exceeding five years from the execution of the works, as the Judge thinks fit.

This being a claim, not for "lands taken", but for "damage done", it is clear that the claim must be made within twelve months after the execution of the works out of which the claim has arisen, or within such extended period (up to a maximum of five years) as may have been allowed under s. 63 of the Statutes Amendment Act, 1939. The claimant contends that the river diversion work undertaken by the Board was one

continuous undertaking, which is still uncompleted, and that, in consequence, his claim was made in time. The Board, on the other hand, contends that the damage complained of was attributable solely to the work done on the No. 1 cut, and that the right to claim lapsed at the expiration of twelve months after the completion of that work. If the Board's view be correct, it is now too late for the claimant to seek an extension of time under s. 63 of the Statutes Amendment Act, 1939, and no such extension has been applied for. The claimant contends that the work done on the No. 2 cut has kept his claim alive, so that, when his claim was made, the twelve-months' period had not expired, if, indeed, it had commenced to run.

Subsection 1 of s. 45 of the Public Works Act, 1928, was to be found in the same form in earlier Public Works Acts, but subs. 2 of s. 45 was first enacted in 1910 as s. 13 of the Public Works Amendment Act, 1910. Subsection 2 defines more clearly the term "execution of the works", which had been in issue in *O'Brien v. Minister of Public Works* ((1910) 29 N.Z.L.R. 476) and in *O'Brien v. Chapman* ((1910) 29 N.Z.L.R. 1053). Those cases arose out of the building of a railway embankment which had caused damage by interference with the natural flow of streams on the claimant's land. The claim was made more than twelve months after the completion of the embankment, but before the completion of the section of railway of which it formed a part.

In *O'Brien v. Minister of Public Works* ((1910) 29 N.Z.L.R. 476), *Chapman, J.*, as President of a Compensation Court, said that the term "execution of the works" was to be construed in a popular sense (*ibid.*, 477). He found that everything that did and could contribute to the damage was completed (and so "executed") when the embankment was completed (*ibid.*, 477), and he held, accordingly, that the claim was out of time. In later mandamus proceedings, the Court of Appeal took a different view: *O'Brien v. Chapman* ((1910) 29 N.Z.L.R. 1053). It held that the section of railway which had been authorized by statute was in law one "work". It further held that the provision as to betterment found in s. 69 of the Public Works Act, 1908, could be given effect to only by reference to the completion of the section of railway as a whole. For these reasons, the claim was held to be in time, but subject to the comment by *Cooper, J.*, that: "The difference of opinion which 'has arisen in this case shows, however, in my opinion, the necessity for 'the Legislature defining in reasonably exact terms the meaning of the 'words 'execution of the works''" (*ibid.*, 1067). The enactment of the subsection which is now s. 45 (2) followed in the same year.

Before this amendment, it had been held in the Supreme Court in *Sullivan v. Mayor, &c., of Masterton* ((1909) 28 N.Z.L.R. 921) that a claim arising out of the widening of a street must be made within twelve months of the taking of the land and the setting back of the fences (which was held to complete the widening of the street), and was not kept alive by work subsequently done on the formation of the street, although the whole work had in fact been continuous. It was further held that, as the question was one affecting its jurisdiction, the contrary decision of the Compensation Court was subject to review by the Supreme Court.

In *Farrelly v. Pahiatua County Council* ((1903) 22 N.Z.L.R. 683), the Court of Appeal held, following *Raleigh Corporation v. Williams* ([1893] A.C. 540), that a public body acting in good faith and within its statutory powers was not liable for damages at common law, and the only remedy of a person suffering damage was that provided by the Public Works Act, 1894, and was subject to the limitations imposed by that Act.

In this case, the work causing damage was the blocking of natural river channels without the deepening and widening of others so as to provide for flood waters. In that case and in *Mayor, &c., of Palmerston North v. Fitt* ((1901) 20 N.Z.L.R. 396), judicial comment was made on the hardship which might arise from the limitation of claims to twelve months; and, in *Lytle v. Hastings Borough* ((1917) N.Z.L.R. 910), *Edwards, J.*, made further reference to hardship in a case where damage alleged to result from certain drainage works had not occurred until more than twelve months after the completion of the works.

It is clear from these decisions that, even before the Public Works Amendment Act, 1910, the twelve-monthly limitation had been strictly applied as being a matter affecting the jurisdiction of a Compensation Court, and that neither hardship nor negligence could justify any relaxation of the strict application of the statutory limitation.

The Public Works Amendment Act, 1910, rendered the position of claimants even more onerous by making it clear that in appropriate cases the twelve-months' limitation may run from the completion of one portion of a more comprehensive work. The amendment appears to be intended to reinstate the view taken by *Chapman, J.*, in *O'Brien v. Minister of Public Works* (1910) 29 N.Z.L.R. 476 and to negative the wider interpretation adopted in *O'Brien v. Chapman* ((1910) 29 N.Z.L.R. 1053). The judicial dicta on hardship bore no fruit until the Statutes Amendment Act, 1939, gave to Supreme Court Judges a limited power to extend the period within which claims must be made. That provision cannot avail the claimant in this case.

Section 45 (2) of the Public Works Act, 1928, does not appear to have been the subject of judicial interpretation, but we think its meaning is reasonably clear. Its intention is to provide that, where the damage complained of is caused by one portion alone of a total work, the twelve-months' limitation shall run from the completion of the portion of the work. The final phrase of the subsection covers the case where minor additions or adjustments are still required after the portion of the work which caused the damage has been substantially completed. In such a case, that portion of the work is deemed to be completed when anything further that may have to be done "thereon" to finish the same will have no effect either to increase or to lessen the damage complained of. The word "thereon" is of significance, as indicating that the only further work to which the phrase relates is work on that portion of the work which caused the damage. It follows that the fact that some other work may have been done (not on the portion of the work which caused the damage) to reduce or remedy the damage does not extend the statutory period within which a claim may be made.

The outline already given of the history of the works undertaken by the respondent Board in the vicinity of Coley's Bend and Barber's Bend will be sufficient to indicate the factual basis for the conflicting views advanced by the claimant, on the one hand, and the Board, on the other, as to the time of completion of the works on which this claim depends. It is not disputed that the original scheme envisaged by Mr. Hay in 1930, and then referred to in the Board's minutes as "Job 10", was for a diversion of the river to eliminate both Bends and involving both the No. 1 cut and the No. 2 cut. The claimant's case rests on the contention that the Board has been engaged from 1930 to the present time on a single and indivisible undertaking for the diversion of the river. This view was accepted by the Committee, and its findings are set out in its decision as follows:



The Committee is quite satisfied that the putting through of the two cuts was really one work, making a complete diversionary scheme, and has all along been regarded as such.

In a later paragraph, the decision says :

- 5 The Committee is of opinion that in fact the work undertaken by the Board is one whole and indivisible work, and the damage sustained by the claimant is attributable, not to any one portion of it, but to the combined effect of the two cuts, one of which is still uncompleted . . . We think in the present case that the damage to the claimant's land was caused by the opening of the No. 1 cut jointly with the failure on the Board's part properly to open and keep open the No. 2 cut, the efficient working of which was an integral feature of the scheme comprised in Job 10. It is true that work on the No. 2 cut is in abeyance at present, but it is by no means certain that it will be finally abandoned. Both the respondent Board's engineer and chairman desire that it should be completed, and, in any event, what this Committee has to consider is whether in fact it has been completed, and as to that there is no question. In our view, the claimant has brought his claim before the completion of the work, and is in time.

- The review of the evidence set out in the decision makes clear that the Committee was of opinion that the "one whole and indivisible work" was the original "Hay scheme", and that the Board has been committed to that scheme and engaged on its execution from 1930 to the present time. The Committee's finding appears to be founded on the frank acknowledgment of the Board's engineer and of its chairman that the "Hay scheme" was in theory sound, and a scheme which they would have liked, and would still like, to see carried to a successful conclusion, though work on the No. 2 cut has now apparently been abandoned. In fairness to the engineer and to the chairman of the Board, however, it should be pointed out that they both at the same time dissented from the suggestion that the Board had been committed continuously to the "Hay scheme". They claimed, on the contrary, that the work recommended by Mr. Hay had been fully carried out between 1930 and 1933 but had failed to achieve its purpose, and that the work commenced in 1940 on the No. 1 cut was a separate undertaking. They claimed also that the work on the No. 2 cut between 1944 and 1948 was again a separate project, for the prevention of further damage lower down the river.

- The Court is concerned with two related but slightly different issues, but in each case we are of opinion that the issue relates, not to the continuity of a "scheme" as such, but to continuity of the "works" undertaken by the Board and alleged to have caused the damage. The issues as we see them are, first, whether the various operations carried out by the Board in this area have constituted a single work or several separate works, and, secondly, whether what was done to open the No. 1 cut—even if not a separate work—was a separate portion of the whole undertaking within the meaning of subs. 2 of s. 45. With great respect to the views so carefully elaborated by the Chairman of the Committee, we have come to a different conclusion on these matters. The scheme of river diversion recommended by Mr. Hay in 1929 appears to have been generally accepted as sound in principle, but we think that the Committee misdirected itself by treating admissions as to the soundness of the scheme in principle as equivalent to admissions that the various works from time to time undertaken by the Board have comprised a single and an indivisible undertaking. Whether these works comprised a single undertaking or several separate undertakings is to be gathered rather from the conduct of the Board than from the opinions of witnesses. We think it is clear that the whole work recommended by Mr. Hay was in fact undertaken and completed in or shortly after 1930. However sound his scheme in principle, Mr. Hay's reliance on pilot channels was found to be a failure.



There is no evidence that the Board took any further action, or deemed itself to be committed to any further action, between 1933 and 1939. There is, however, the positive evidence of the chairman of the Board and of its engineer to the contrary. It is agreed that the work commenced on the No. 1 cut in 1940, like that undertaken ten years earlier, was done for the protection of the Makerua, but there is nothing improbable in the Board's claim that it treated the work done in 1940 as an entirely new project. The work on the No. 1 cut was successful in removing the danger to the Makerua, and it is now clear that the opening of the No. 2 cut was not necessary for that purpose. Work on the No. 2 cut was not commenced until February, 1944, and the only evidence that the Board intended in 1940 to go on with the No. 2 cut is the statement by Mr. Barber that he was then promised that both cuts would be proceeded with. Having regard to the subsequent conduct of the parties, we think that what transpired was that the Board appreciated that it might be advisable at a later date to open the No. 2 cut for the protection of Mr. Barber's property, and agreed that this would, if necessary, be done. This is not inconsistent with the claim that all the Board undertook in 1940 was the work on the No. 1 cut, and that the work subsequently done on the No. 2 cut was a separate undertaking.

The evidence of Mr. Farquhar, the River Board's engineer, impressed us as given with frankness and sincerity, and appears to have been so accepted by the Committee. Mr. Farquhar said in evidence before the Committee:

I was first interested in the Taipunga scheme in 1939. I then investigated the possibility of developing the No. 1 cut. In 1940 I suggested a contract be let to cut a gully through the clay at the entrance to No. 1 cut . . . No. 2 was not being considered. Up to 1940 both cuts had been abandoned . . . In July, 1943, I reported erosion at Barber's estate downstream from the bend, and recommended the No. 2 cut be reopened. I regarded them as separate jobs.

In his evidence before the Court, Mr. Farquhar said:

Between 1930/31 and 1939 I had no knowledge of anything done on the No. 1 cut. Up to that time, from 1935 to 1939 we regarded the whole work as a failure. In 1939 a drag-line machine became available, and I submitted to the Board that this machine would cut a gullet through the clay blanket and in all probability make the No. 1 cut develop. When developing the No. 1 cut, I did not have No. 2 in mind. At that time, No. 2 cut was completely silted at the entrance and 75 per cent. silted at the outlet. The gullet for No. 1 was put in in 1940. It steadily developed, with assistance, and in 1944 was taking the whole river flow. I made a report to the Board in September, 1943, that erosion was taking place on Barber's estate downstream. I recommended the No. 2 cut be opened. My recommendation to open No. 2 cut was the result of the necessity of minimizing erosion occurring. I regarded the two jobs as entirely separate.

Similar evidence was given by the chairman of the Board, and we see no reason why it should not be accepted.

If this evidence is taken at its face value, the work done since 1930 has comprised, not one undertaking, but three undertakings—namely, (i) in 1930, the original Hay scheme, which was substantially a failure; (ii) in 1940, the opening of the No. 1 cut, to eliminate Coley's Bend; and (iii) in 1944, the attempt to open the No. 2 cut to reduce or eliminate erosion downstream. It is clear that the Board had not the financial resources to commit itself to all these works as one undertaking, and each stage of the work was dependent upon the Board's being able to make suitable financial arrangements. For the purpose of the 1930 work, it had to rate a special area, and in 1940 it had to secure a Government grant before the work on the No. 1 cut could proceed. The work on the No. 2 cut in 1944 required similar but separate financial arrangements.

While it is true that all these works were related, and may loosely be said to be successive operations in accordance with the original "Hay scheme", the actual works were individually conceived and financed, and were widely separated in point of time.

- 5 If, however, this view be not accepted, we think the work done on the No. 1 cut must be held to be a separate portion of the undertaking as a whole. It was undertaken after several years of inactivity, and as the result of an immediate threat to the Makerua, and in response to urgent representations from the residents, who were concerned only with the danger from Coley's Bend. It was dependent on Government assistance and on the approval of the then Minister of Works. There is no evidence that the work then planned and approved included any work or expenditure on the No. 2 cut. No work was, in fact, done on that cut for nearly four years thereafter.

- 15 The claim having been lodged on August 15, 1950, it is clear, having regard to the authorities quoted, that it is incumbent on the claimant to establish that the execution of the relevant works was completed no earlier than August 15, 1949. Our findings on the facts in relation to that crucial date are as follows:

- 20 1. The work on the No. 1 cut was successfully completed by the year 1944, and there is no evidence of any work's being done thereon since that year.

2. The last work carried out on the No. 2 cut was in 1948, and, although the Board had further work under consideration during 1949, 25 no work was actually done on the No. 2 cut after August 15, 1949.

3. The only work carried out after August 15, 1949, was the dumping of stone on the river frontage of the Barber property, as a protection against further erosion.

- It is proper to mention at this stage that several plans and a number of photographs were put in to show the state of the river at various stages of the work. Counsel for the claimant suggests that these photographs justify our fixing a date later than 1944 for the completion of the work on the No. 1 cut. While the plans and photographs are of considerable assistance to us in conjunction with *viva voce* evidence, however, we cannot 35 properly draw conclusions from them which are unsupported by evidence, or contrary to the weight of evidence. Unless adequately explained in evidence, photographs may readily be misinterpreted, but, by and large, we think the photographs in this case confirm the evidence of the witnesses for the respondent Board.

- 40 It remains necessary for us to consider one more question of fact: What was the work which caused the damage complained of? The damage is situated a little below Barber's Bend at a point where, before the No. 1 cut, there had been no erosion but a tendency to accretion. Mr. J. W. Barber, a son of the claimant, said in evidence:

- 45 The estate property was free from erosion until the time the No. 1 cut started to become the river. Since then, there has been continual erosion on the whole face, going on since the cut became the river.

- Mr. W. E. Barber said: "When the No. 1 cut developed, erosion commenced on my property." Mr. Barber's first complaint to the Board in October, 1943, was concerning "the effect of the Taupunga 50 Cut" and his concern at "the damage that has taken place over the last three months, due mainly to the added volume of water which is pouring through the cut". The letter from his solicitors in November, 1943, contains the statement:

The effect is that the water flowing through the cut rebounds from the left bank of the river on to our client's land and has caused and is causing serious erosion.

The plans and photographs confirm that this erosion commenced when the No. 1 cut became effective, and continued progressively thereafter. We find no evidence that the ineffective operations on the "Hay scheme" from 1930 to 1933 were in any degree responsible for the damage complained of, or that the work subsequently done on the No. 2 cut was in any respect a "cause" of the damage, or of any of it. The claimant's repeated urging of the Board to open the No. 2 cut was directed, not to the removal of a cause, but to the provision of a remedy for damage acknowledged to be due to the diversion of the river through the No. 1 cut.

Having regard to these facts, on which there was little dispute, we are unable to agree with the Committee that the damage was caused by the joint effects of the No. 1 cut and No. 2 cut, or, as it is put, "by the opening of the No. 1 cut jointly with the failure of the Board properly to open and keep open the No. 2 cut." We think, on the contrary, that the whole of the damage is attributable to the diversion of the river through the No. 1 cut. If this be so, the claim is out of time.

Even if the work done on the No. 2 cut could properly be taken into account, however, the claim would still be out of time, for the last work shown in evidence to have been done on that cut was in 1948, unless it could properly be held that the twelve-months' period had not yet commenced to run, for the reason that the No. 2 cut had never been completed. Such a loose interpretation of s. 45 would render the protection intended to be afforded to public bodies entirely ineffectual. We think that s. 45 (2) is intended to make it quite clear that a claim arising out of one clearly-defined portion of an undertaking cannot be indefinitely delayed pending the completion of the undertaking as a whole. The terms of the subsection do not permit the construction that such a claim is kept alive by the respondent's undertaking separate remedial works at the behest of the claimant.

We are accordingly of opinion that the claim is out of time, and, as the matter is one affecting the jurisdiction of the Court, we cannot be influenced by considerations of equity or hardship. It is therefore unnecessary for us to consider the quantum of damage. It is not disputed that the claimant has suffered damage, but it is fair to point out that his property has always been liable to grave risks from flooding and erosion, that the Board has already spent many thousands of pounds in part at least for the protection of the Barber Estate, and that the claimant will probably receive substantial benefits from accretions to his land as a result of the silting up of Barber's Bend.

The appeal by the Board is accordingly allowed, and the award of compensation by the Committee vacated. The cross-appeal by the claimant is in consequence dismissed. No costs will be allowed.

*Appeal allowed.*

Solicitors for the claimant: *McGregor and McBride* (Palmerston North).

Solicitors for the respondent: *Oram and Yorlt* (Palmerston North).

[IN THE SUPREME COURT.]

## AUCKLAND TRANSPORT BOARD v. NUNES AND OTHERS.

SUPREME COURT. Auckland. 1952. March 19; April 3. FAIR, J.

*Tramways—Appeal Board—Jurisdiction—Appeal from “dismissal”—Scope of Jurisdiction—“Dismissals”—Tramways Amendment Act, 1910, s. 6 (2).*

The meaning of the word “dismissal” in the context in which it appears in s. 6 (2) of the Tramways Amendment Act, 1910, is not confined to wrongful dismissals; the word is there used in the sense of either a peremptory or arbitrary dismissal or a dismissal after due notice or payment under the terms of the contract of employment.

*Rockland v. Auckland Electric Tramway Co., Ltd.* ([1918] N.Z.L.R. 824) and *Konski v. Peet* ([1915] 1 Ch. 530) referred to.

*Buttle v. Saunders* ([1950] 2 All E.R. 193) mentioned.

Thus, in the present case, in view of the allegation that the dismissal was founded upon the alleged misconduct of the employee, the fact that he was given a week's pay would not prevent his dismissal's being in the nature of a punishment inflicted on him for wrongdoing; and the Appeal Board had jurisdiction to hear and determine his appeal from such dismissal.

APPLICATION for a writ of prohibition to prohibit a Tramways Appeal Board at Auckland from exercising any further jurisdiction in the appeal of one Nunes, who was named in these proceedings as the second defendant.

Before August 2, 1951, Nunes was employed by the Auckland Transport Board as a bus operator. On that date, his employment was terminated, and he was given one week's pay in lieu of notice. On August 31, he gave notice of appeal under s. 6 of the Tramways Amendment Act, 1910, against his dismissal, alleging that it was stated by the Superintendent of buses and trolley-buses that, upon his record, he considered he was not a satisfactory bus operator; and he was dismissed “as being unsatisfactory”. He alleged he was dismissed without any sufficient or just cause, and that he was not guilty of either of the offences with which he was charged on August 2, or of any breach of duty; that evidence was admitted which should not have been admitted; and that offences were alleged against him of which he had not been given any notice. He claimed that his dismissal was, in fact, in respect of these alleged offences, either alone or in conjunction with the two with which he was charged on August 2, and that, in any case, the punishment of dismissal was excessive. This notice of appeal was verified by a statutory declaration in accordance with the Regulations providing for appeal under s. 6.

Before the appeal was heard, counsel for the present plaintiff and for Nunes desired that the Appeal Board should determine a preliminary point as to its jurisdiction, in order to enable either party, if they thought it desirable, to contest the validity of such determination in the Supreme Court.

The following facts were admitted and agreed, “but without prejudice to the right of either party to lead evidence of any fact at the hearing of the appeal on its merits”:

(a) That the appellant Harry Nunes was employed by the respondent Board from January 25, 1950, to April 17, 1950, as a conductor, and thereafter until August 2, 1951, as a bus operator.

(b) That the appellant was at all material times a member of the New Zealand Tramways and Public Passenger Transport Authorities' Employees' Industrial Union of Workers.

(c) That at all material times that Union and the respondent were parties to the New Zealand Tramways Authorities Employees' Award.

(d) That on August 2, 1951, the appellant's employment with the respondent was terminated, and he was paid one week's pay in lieu of notice.

(e) That the appellant in due time and in proper form filed and served a notice of appeal to the Auckland Tramways District Appeal Board 10 against such termination of his employment.

The preliminary point for determination was said to be "whether the Auckland Tramways District Appeal Board has jurisdiction to hear and determine the appeal so filed and served by the appellant."

The question of jurisdiction was argued before the Tramways Appeal Board on September 14, 1951, and on November 26, 1951, a judgment was given in which the Board held, for reasons which it set out at length in writing, that it had jurisdiction to hear such appeal: *In re Nunes's Appeal*, (1952) 7 M.C.D. 423.

The present proceedings were an application to this Court to prohibit 20 the Board (herein named as the first defendants) from exercising any further jurisdiction in the appeal.

*B. C. Haggitt*, for the plaintiff.

*Haigh and Beattie*, for the second defendant.

*Cur. adv. vult.* 25

FAIR, J. Section 6 of the Tramways Amendment Act, 1910, so far as it is relevant, provides as follows:

(2) The Board shall hear and determine all appeals by tramway employees against dismissals, disarings, fines, or other punishments, or reductions in pay or other emoluments, inflicted by their employers, and also appeals on the ground of promotion 30 being unreasonably withheld. In any determination of the Board on any appeal relating to rates of pay regard shall be had to any award or industrial agreement in force under the Industrial Conciliation and Arbitration Act, 1908, relating to tramway employees within the district.

(3) The determination of the Board shall in the case of every appeal be reported 35 to the Minister, and shall be binding on all parties and enforceable in any Court of competent jurisdiction.

Upon the hearing of this application, Mr. *Haggitt*, on behalf of the Board, argued that the word "dismissal" in subs. 2 referred only to summary dismissal for wrongdoing in breach of duty, &c. He submitted that, where a week's notice was given, or a week's pay in lieu of notice, 40 there had been a lawful termination of employment, and that the word "dismissal" was not apt in this context to cover such a termination. He supported this argument by reference to various authorities and judgments which use the words "termination of employment" to describe "dismissal" of a servant upon notice given in accordance with 45 the contract of employment.

He further supported his submission by reference to the specific provisions contained in ss. 149 and 151 of the Education Act, 1914. Section 149 provides as follows:

Any teacher who has received a notice of dismissal, suspension, or transfer may 50 within forty-two days after the receipt of the notice appeal in the prescribed manner to the Court.

The opening words of s. 151 provide as follows :

For all the purposes of this Part of this Act a teacher shall be deemed to be dismissed in any case where his engagement is determined by notice from the Board or where his salary is reduced by the Board.

- 5 But it appears that the question which the Court has to consider is the meaning of the word "dismissal" in the context in which it is found in the Tramways Amendment Act, 1910. Comparisons with use of language dealing with other occupations in very different circumstances and legislative enactments in a different sphere of employment cannot, I think, be  
10 considered as a safe guide to what is the meaning intended by similar language used in an entirely different sphere of employment. That is, in effect, what *Cooper, J.*, says about this aspect in *Rockland v. Auckland Electric Tramway Co., Ltd.* ([1918] N.Z.L.R. 824, 827).

- It would appear safer to follow the ordinary rule of construction by  
15 first considering whether the words of the subsection in their ordinary meaning have a plain meaning, apart altogether from authority and comparison.

- Mr. *Haggitt* further submitted that the word "dismissal" had a plain and unambiguous meaning, and that the Court was bound to act on that  
20 meaning, which was in the sense for which he contended. But, as is said in *Maxwell on The Interpretation of Statutes*, 9th Ed. 20 :

Language is rarely so free from ambiguity as to be incapable of being used in more than one sense, and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many.

- 25 The principles of construction to be applied in this case are, I think, those cited by Mr. *Beattie* from *31 Halsbury's Laws of England*, 2nd Ed. 506, 507, para. 653 :

- Judicial interpretation should be directed to avoiding consequences which are inconvenient and unjust, if this can be done without violence to the spirit or the  
30 language of a statute. If the language is ambiguous and admits of two views, that view must not be adopted which leads to manifest public mischief, or inconvenience, or to injustice . . . In advancement of a remedial statute everything is to be done that can be done consistently with a proper construction of it, even though it may be necessary to extend enacting words beyond their natural import  
35 and effect.

- In my view, the usual meaning of "dismissal" is not confined, as Mr. *Haggitt* contended, to a wrongful dismissal. The English word is derived from the two Latin words which originally meant "to send away". The word is frequently used to cover dispensing with the services of a  
40 servant by a lawful notice putting an end to his employment. It is used in this sense by *Neville, J.*, in *Konski v. Peet* ([1915] 1 Ch. 530), where he says : "first of all with regard to the question of the dismissal of Miss Peet from Mr. Konski's employment. She was engaged under a weekly  
45 "agreement at a weekly salary, and on the occasion in question Mr. "Konski gave her a week's salary and more, but I think that is immaterial ; "he paid her for the week which was due and gave her another week's "salary for the forthcoming week, and told her that he did not wish her "to return to his place of business . . . In my opinion he had dis-  
50 "charged the obligation which he had undertaken under his agreement by "paying her the salary which he agreed to pay, and if he chose to pay her "her salary and dispense with her services at the same time he was "entitled to do so" (*ibid.*, 537, 538).

- It is used in the same sense by *Cooper, J.*, in *Rockland v. Auckland Electric Tramway Co., Ltd.* ([1918] N.Z.L.R. 824), where it appears from  
55 the argument of counsel for the tramway company that the appellant, as reported in the *New Zealand Law Reports*, and from the fuller report in

[1918] G.L.R. 636, was offered three weeks' pay in lieu of notice of the termination of his employment.

The same conclusion is reached if the ordinary meaning of the word is ascertained from a standard dictionary. According to Webster, "to dismiss" is to "send or remove from office, service or employment ; discharge."

It would appear, therefore, that the word "dismissal" may be used in the sense of either a peremptory or arbitrary dismissal or a dismissal after due notice or payment under the terms of the contract of employment.

It is possible to conceive the Legislature giving an appeal only against dismissal which was, in fact and in truth, based upon misconduct or unsuitability. But, if such appeal were given only in such cases, it would be expected that the Appeal Board would have the right to determine whether or not the real reason for the dismissal was an allegation of misconduct or incapacity, or whether it was due to economic or other similar grounds not personal to the appellant. Otherwise, the right of appeal could largely be rendered nugatory by the employer's declining to state the reason for the dismissal and claiming to exercise a contractual right of dismissal. But it appears that in the present case this direct issue does not arise, because, according to the claim of the appellant, his dismissal was expressly stated to have been based on his misconduct. That allegation not being denied—at least, so far as the records before this Court show—by the plaintiff, it must, for the purpose of these proceedings, be assumed to be capable of proof.

Apart from considerations that I shall later advert to, it appears to me that the word "dismissal" *prima facie* has the wider meaning if it is considered only as a pure question of construction dependent on the language used in the subsection itself, for the subsection gives appeals on the ground of promotion's being unreasonably withheld. The right to promote and choose who shall be promoted is at common law the absolute and unfettered right of the employer, but here that absolute right is abrogated and the right to promotion is made a subject of appeal. The award governing the industry in cl. 25 (a) to (c) seems to give instances of appointments that may be regarded as minor promotions, and gives an appeal in respect of them. This is not a right of appeal against punishments ; it is restriction upon the employer's right to choose arbitrarily the men it considers most suitable for promotion, and is perhaps the most striking example of the subsection's wide scope and overriding of the common-law rights of an employer. As there is an interference with that part of the employer's previously existing legal rights, there seems no strong presumption against interference with another term of the contract, such as the power of dismissal on notice.

This seems in accordance with the view taken by *Cooper, J.*, in *Rockland's case* ([1918] N.Z.L.R. 824), where it is stated : "The provisions in the Act of 1910 giving to an employee of a tramway company the right to appeal to the statutory Board against his dismissal, disrating, fines, or other punishment were passed for the benefit and protection of the employee, and this is clearly indicated by the last words of the section" (*ibid.*, 828). Later, he says : "I think the intention of the Legislature was to give to the employees of a tramway company or authority some measure of security of tenure in their employment protecting them from an improper determination of their employment by the company or authority employing them" (*ibid.*, 830).

These considerations by themselves might leave the matter still open to some doubt, but, when it is submitted that giving a week's notice, or



- pay in lieu thereof, would prevent any employee from exercising the right of appeal, even where it was plain that his dismissal was actually based upon quite unfounded allegations of misconduct, such a construction seems to me to be inadmissible. As the Board has put it in its judgment,
- 5 such an interpretation would render the right of appeal, and the benefits referred to in *Rockland's* case, practically nugatory, for the authority concerned would no doubt prefer in all except, perhaps, flagrant cases to avoid controversy by giving a week's notice or wages rather than to make the dismissal on grounds of misconduct. It was argued that this would
- 10 be a misuse of their powers by the authorities concerned. But, if they have a legal right to dismiss without challenge by such a course, then to exercise their legal right is not a misuse of authority. Indeed, it might well be argued that they were bound to take this course, and would be failing in their duty if they did not do so. Comparison may be made
- 15 with the decision in *Buttle v. Saunders* ([1950] 2 All E.R. 193), where it was held that trustees have an overriding duty to obtain the best price for trust property, even if this requires them to commit what an individual might regard as a breach of honourable commercial practice.

- In the present case, in view of the allegation that the dismissal was
- 20 founded upon the misconduct of the employee in his employment, the fact that he was given a week's pay would not prevent his dismissal from being in the nature of a punishment inflicted on him for wrongdoing. This consideration reinforces that referred to in the last paragraph as providing a clear instance of where the purpose and intention of the subsection
- 25 would be defeated if a complaint about an unjust dismissal were debarred from appeal as the result of payment of a week's wages. In many cases, the worker has made arrangements relying upon the continuance of his employment, and his dismissal may inflict on him much more inconvenience and loss than a week's wages would compensate for, as it did, for example,
- 30 in *Rockland's* case.

For these reasons, which are substantially the same as those given by the Board, I think that in the present case the plaintiff has failed to show that the Appeal Board is without jurisdiction. I think it has jurisdiction, and the application must be refused.

- 35 I do not think it either necessary or advisable to decide the general question as to what would be the position in a different case, where an employee's services are determined owing to economic conditions completely and entirely irrespective of any fault or incapacity on his part. It may be that there is an appeal even in such a case, for the subsection
- 40 may extend to give the employees a right of appeal against the selection of surplus staff when it has to be reduced.

The defendant Nunes is entitled to costs, which are fixed at £26 5s. and disbursements.

*Application refused.*

- 45 Solicitors for the plaintiff: *Earl, Kent, Massey, Palmer, and Haggitt* (Auckland).

Solicitor for the second defendant: *F. H. Haigh* (Auckland).

### JONES v. HOBBS.

SUPREME COURT. Palmerston North. 1952. May 21; August. 27.  
HUTCHISON, J.

*Transport—Offences—Failure to give way at Intersection—Junction of Driveway to Sanatorium with Main Road an "Intersection"—"Road"—"Intersection"—Transport Act, 1949, ss. 2, 40, 58, 59, 169 (3)—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 14 (6).*



The appellant was driving a small truck from the driveway, or road, leading to Mill Road from the Otaki Sanatorium (an institution under the Hospitals and Charitable Institutions Act, 1926, and controlled jointly by two Hospital Boards). As he came on to Mill Road, he collided with a taxi driven on that road and approaching from his right. Mill Road had on it a strip of bitumen 19 ft. wide; on the side next to the Sanatorium grounds, there was a strip of gravel, and then an unformed grass strip. There was no gate at the Sanatorium entrance. From the Sanatorium entrance to the gravel of Mill Road there was a piece of formed road across what would otherwise be a grass verge. The land over which the driveway led from the entrance gateway to the Sanatorium buildings was land belonging to the institution. The Justices found as a fact that the road leading to the Sanatorium was a road to which the public had access and which was in general use for vehicular traffic.

The appellant was convicted of the offence of failing to give way at an intersection to another motor-vehicle approaching from his right. On the appeal, the point of law in issue was whether the junction of the Sanatorium road, or driveway, with Mill Road was an intersection for the purposes of Reg. 14 (6) of the Traffic Regulations, 1936.

*Held*, 1. That the road leading to the Sanatorium, to which the public had access and which was in general use by vehicular traffic, was within the meaning of the definition of the term "road" in Reg. 2 of the Traffic Regulations, 1936, which, by virtue of s. 169 (3) of the Transport Act, 1949, is *intra vires* that statute.

2. That, under the provisions of the Transport Act, 1949, and the Traffic Regulations, 1936, the junction of the Otaki Sanatorium driveway with Mill Road was an "intersection" within the meaning of Reg. 14 (6) of those Regulations.

*Wallace v. Muir* ([1933] N.Z.L.R. 131) distinguished.

3. That, since the "lateral boundary-lines" referred to in the definition of "intersection" in Reg. 2 of the Traffic Regulations, 1936, are the normal lateral boundary-lines of each of two roadways for a reasonable distance back from where they join, the junction with the usable portion of a road of the few feet of roadway crossing the grass verge from a gateway does not form an "intersection" within the meaning of the definition.

*Lee v. Madge and Cole* ([1943] N.Z.L.R. 569) applied.

APPEAL on point of law from the conviction of the appellant by Justices of the Peace at Otaki on an information under Reg. 14 (6) of the Traffic Regulations, 1936, which requires the driver of a motor-vehicle to give way at an intersection, in certain circumstances, to another motor-vehicle approaching from his right. 5

The appellant was driving a small truck from the driveway, or road, leading from the Otaki Sanatorium to Mill Road. As he came on to Mill Road, he came into collision with a taxi driven on that road and approaching from his right. Mill Road had on it a strip of bitumen 19 ft. wide; on the side next to the Sanatorium grounds, there was a strip of gravel, and then an unformed grass strip. There was no gate at the Sanatorium entrance. From the Sanatorium entrance to the gravel of Mill Road there was a piece of formed road across what would otherwise be the grass verge. The Sanatorium was an institution within the Hospitals and Charitable Institutions Act, 1926, controlled, according to information given by counsel, jointly by the Wellington and Palmerston North Hospital Boards. The land over which the driveway lead from the entrance gateway to the Sanatorium buildings was land belonging to the institution. 10 15

The point of law was whether the junction of the Sanatorium road, 20 or driveway, with Mill Road was an intersection for the purposes of Reg. 14 (6) of the Traffic Regulations, 1936.

*B. J. Cullinane*, for the appellant.

*McGregor*, for the respondent.

HUTCHISON, J. [After stating the facts, as above :] For the appellant, it was argued that, having regard to the definitions of "intersection", "roadway", and "road" in Reg. 2 of the Regulations, the meeting of this driveway and Mill Road is not an intersection. Reliance was placed on the judgment of *Smith, J.*, in *Wallace v. Muir* ([1933] N.Z.L.R. 131), the reasoning of which, it was submitted, has not been affected in any way by subsequent changes in any statutory provisions, or in the Regulations themselves, and that the test of whether the junction of any formed driveway with a road is an intersection is whether control of that driveway can be exercised by a controlling authority as defined in the Regulations.

For the respondent, it was first submitted that the junction with the usable portion of Mill Road of the few feet of roadway crossing the grass verge from the gateway forms an intersection. I do not think that it is the intention of the Regulation that an intersection may be formed in that way. If the submission were sound, it would mean that there is an intersection whenever a few feet of usable roadway cross a grass verge at the entrance to a farm, and that traffic along the road must be ready to give way to traffic from any such farm gateway on the right. An intersection is defined as meaning the "area embraced by the pro-  
longation or connection of the lateral boundary-lines of each roadway". In *Lee v. Madge and Cole* ([1943] N.Z.L.R. 569), *Smith, J.*, said that the "lateral boundary-lines" referred to in the definition are the "normal lateral lines approaching the intersection" (*ibid.*, 572), and I think that this requires consideration of the lateral boundary-lines of each of two roadways for a reasonable distance back from where they join, and does not contemplate an intersection being formed, as contended in this submission.

The substantial submission for the respondent was that the driveway is a "way . . . to which the public has access" within the definition of "road" in Reg. 2 of the Traffic Regulations, 1936; that the amendment of the Regulation which brought in these words, which was made since the decision in *Wallace v. Muir* ([1933] N.Z.L.R. 131), and the provisions of the Transport Act, 1949—in particular the definition of "road" contained in s. 2 (1) of that Act, including the words "whether as of right or not"—render the reasoning in *Wallace v. Muir* no longer applicable; and that the junction of the driveway with Mill Road is an intersection within the definition.

In the Motor-vehicles Act, 1924, which was in force at the time of *Wallace v. Muir*, there was no definition of "road". In the Regulations as they then stood, (1928 *New Zealand Gazette*, 511), "road" was defined as follows:

"Road" includes street, and any portion of a road or street.

In *Wallace v. Muir* ([1933] N.Z.L.R. 131), *Smith, J.*, said: "Where Regulations do not define the meaning of an expression used therein, then, unless the contrary intention appears, such an expression has the same meaning in the Regulations as in the Act conferring the power to make them (s. 7 of the Acts Interpretation Act, 1924). The power to make the Regulations here in question is conferred by s. 36 (1) (o) of the Motor-vehicles Act, 1924, which is as follows: '36. (1) The Governor-General may, by Order in Council, make regulations—  
(o) Prescribing the maximum weight and the maximum width of any motor-vehicle, and any load thereon, that may be used on any road or street, and generally regulating motor traffic on roads and streets

"and public places, and making rules to be observed by vehicles other than motor-vehicles when passing or being passed by motor-vehicles on any road or street or public place." Subsection 2 of s. 36 provides as follows: "The power to make regulations regulating motor traffic includes the power to make regulations prohibiting such traffic, either absolutely or conditionally, on any specified road, street, or place to which the public have access, whether as of right or not." Clearly, the meaning of 'road' in para. (o) means a public road of some kind, as it is ranked with public places. The power conferred by subs. 2 is exercised only when Regulations are made with respect to a specified road, street, or place to which the public have access, whether as of right or not. The question arises as to whether the words 'place' to which the public have access, whether as of right or not, indicate that the meaning of the words, 'road', 'street', and 'public place' in s. 36 (1) (o) is extended so that any of them must be regarded as public if the public have access to them" (*ibid.*, 139, 140). His Honour then examined a number of provisions of the Motor-vehicles Act, 1924, and said: "In the light of the foregoing considerations, it seems to me clear that the power to make Regulations conferred by s. 36 (1) (o) and s. 36 (2) is, at least, confined to roads, streets, and public places which are under the control of public authorities for the regulation of traffic in the public interest, whether the fee-simple thereof is actually vested in the public authority or not, and whether the access of the public thereto is by right or not" (*ibid.*, 141). He added that the Regulations themselves showed that this limit must be placed on the meaning of the relevant words in the Regulations.

Section 169 (3) of the Transport Act, 1949, provides as follows:

All . . . regulations . . . that originated under any of the enactments hereby repealed [which include the Motor-vehicles Act, 1924] . . . and are subsisting or in force at the commencement of this Act shall enure for the purposes of this Act as fully and effectually as if they had originated under the corresponding provisions of this Act, and accordingly shall, where necessary, be deemed to have so originated.

If, then, the Transport Act, 1949, requires a different view to be taken of the Regulations on the point in this case from that taken by *Smith, J.*, in *Wallace v. Muir*, such a different view should now be taken. The Transport Act, 1949, is not merely a consolidating Act. Its title is: "An Act to Consolidate and Amend Certain Enactments Relating to Motor-vehicles, to Road Traffic . . ."

The principal matter pointed to as justifying and requiring such a different view is the definition of "road" in s. 2 of the Transport Act, 1949:

"Road" includes a street, and any other place to which the public have access, whether as of right or not, and also includes all bridges, culverts, ferries, and fords forming part of any road, street, or other place as aforesaid; but does not include a motor-way within the meaning of the Public Works Amendment Act, 1947.

Looking at the Transport Act, 1949, in the light of that definition, it seems to me to be reasonably clear that the Act requires (s. 15) that a motor-vehicle be registered and duly licensed before it is used in a place to which the public have access, whether as of right or not, and (s. 29) that a person may not drive a motor-vehicle in such a place unless he is the holder of a motor-driver's licence. The test, under the Transport Act, 1949, as to whether these requirements apply is not, as it seems to me, what control there is of the place, but is simply whether the public have access to the place, whether as of right or not. Emphasis is placed

- on this difference by the fact that by s. 21 (3) of the Motor-vehicles Act, 1924, the person empowered to require the production of a motor-driver's licence for inspection is "any constable, or . . . any person authorized in that behalf by a local authority or by any other person or body"
- 5 "having control of any road or street", while the person so empowered by s. 30 (4) of the Transport Act, 1949, is simply "any constable or Traffic Officer". An application of the definition of "road" in the Transport Act, 1949, appears from a comparison of the corresponding s. 40 of the Transport Act, 1949, and s. 28 of the Motor-vehicles Act,
- 10 1924. Each section makes it an offence to drive a motor-vehicle (*inter alia*) recklessly or negligently, or, while in a state of intoxication, to be in charge of a motor-vehicle, in certain places. Those places are stated in s. 28 (1) of the Motor-vehicles Act, 1924 ("on any road, street or other
- "place to which the public have access, whether as of right or not"),
- 15 while in the Transport Act, 1949, only the comprehensive expression "on any road" is, or need be, used.

- The regulation-making power contained in ss. 167 and 50, particularly s. 59 (t), of the Transport Act, 1949, is, likewise, wider, having regard to the definition of "road" in the Act, than that contained in s. 36 (1) (o)
- 20 of the Motor-vehicles Act, 1924, and, in my view, covers the making of Regulations dealing with the conduct of motor-drivers on places to which the public has access, without regard to the question of control of those places.

- In the Regulations as they now stand, the definition of "road" is—
- 25 and this has been so since 1936 :

"Road" includes any road, street, footpath, and any portion of a road, street, or footpath, and any way or portion of a way to which the public has access including a bridge.

- Whatever may have been the position when the amended definition was first included in the Regulations, this definition seems to me to be now,
- 30 by virtue of s. 169 (3) of the Transport Act, 1949, clearly *intra vires*.

- The definition of "road" applicable for the purposes of the definition of "intersection" in the Regulations must be the definition contained in the Regulations. Nothing in this case turns on the absence in the
- 35 definition in the Regulations of the words "whether as of right or not". It may not, in my view, be argued that the absence of those words in itself confines "road", as defined in the Regulations, to one to which the public has access as of right. The Justices have found that the road leading to the Hospital and Sanatorium is a road to which the public have
- 40 access and is in general use by vehicular traffic, and that finding is not criticized. That brings the roadway within the definition of "road" in the Regulations, unless, as submitted for the appellant, the question of control by a controlling authority is decisive.

- The matters in the Regulations that *Smith, J.*, in *Wallace v. Muir*
- 45 ([1933] N.Z.L.R. 131) refers to as supporting the view that he took on a consideration of the Motor-vehicles Act, 1924, were the definition of "controlling authority" and the classification of roads, which then appeared in Reg. 1, and which, subject to alteration in the definition of "controlling authority", now appear in Regs. 2 and 3, and the reference
- 50 in the Regulation dealing with the off-side rule to control by a police officer or traffic inspector. I think that it is clear that His Honour considered that anything to be found in the Regulations was of small weight compared with indications afforded by the Act. With the amended definition of "road" in the Regulations, in my view, any weight
- 55 to be given to those matters in the Regulations has disappeared. The

control that we would be concerned with is not the control of the building or maintenance of the roadway or the like, but is the control of traffic on the roadway. If the public has access to a roadway, then a traffic officer, as a member of the public, has access to it, and Reg. 3 (2) provides :

A traffic inspector appointed by the Minister or the Main Highways Board or a police officer shall be entitled to exercise the powers hereby conferred on him upon any road.

In my view, then, the considerations that led to the decision in *Wallace v. Muir*, with which decision I would, with great respect, have been in full agreement, no longer apply. In my opinion, under the provisions of the Transport Act, 1949, and the Regulations as they now stand, the junction of the Otaki Sanatorium driveway with Mill Road is an intersection within the meaning of the relevant Regulation.

What I have said is of small moment as regards a person in the position of the appellant coming out of a roadway of the type of the Otaki Sanatorium driveway, because, if he then allowed his motor-vehicle to come into collision with another motor-vehicle coming from his right on the public road, if he were not guilty of a breach of the off-side rule, he would probably be guilty of negligent driving or some other offence. I appreciate that it is of more moment to persons driving on the public road, because, on this view of the law, such persons would be required to be ready to give way to motor traffic coming out of a driveway on their right if it is one to which the public has access. However, that, I think, is the effect of the Act and Regulations.

The appeal is dismissed and the respondent allowed £7 7s. costs.

*Appeal dismissed.*

Solicitors for the appellant : *Park, Bertram, and Cullinane* (Levin).

Solicitors for the respondent : *McGregor and McBride* (Palmerston North).

[IN THE LAND VALUATION COURT.]

VALUER-GENERAL v. MANNING.

LAND VALUATION COURT. Auckland. 1952. May 27 ; August 4. ARCHER, J.

*Valuation of Land—Value for Death-duty Purposes—Residential Property—Fair Market Value to be ascertained—Replacement Cost merely Factor in assessing Fair Market Value—Costs—Order for Payment by Valuation Department of Part of Objector's Costs—"Price"—"Capital value"—Death Duties Act, 1921, s. 70 (5)—Valuation of Land Act, 1951, s. 2—Land Valuation Court Act, 1948, s. 32.*

The definition of "capital value" in s. 2 of the Valuation of Land Act, 1925 (now 1951), which relates capital value to saleability at a hypothetical sale, is not intended to create a new standard of valuation for rating and duty purposes, but is intended to apply to valuations made for those purposes the established conception of "fair market value", which is assessed by reference to a hypothetical sale between a willing seller and a willing buyer.

*Duthie v. Valuer-General* ((1901) 20 N.Z.L.R. 585), *Thomas v. Valuer-General* ([1918] N.Z.L.R. 164), and *Valuer-General v. Wellington City Corporation* ([1933] N.Z.L.R. 855) followed.

*In re Oriental Hotel, Muir to Nivall* ([1944] N.Z.L.R. 512) and *Spencer v. Commonwealth of Australia* ((1907) 5 C.L.R. 418) applied.

The "replacement cost" method of valuation should be regarded, not as an alternative to market value, but as a factor to be considered in the assessment of a fair market value.

*Valuer-General v. Wellington City Corporation* ([1933] N.Z.L.R. 855) followed.

*D. to E.* ((1944) (No. 1) 20 N.Z.L.J. 155) and *R. Estate to B. Co., Ltd.* ((1947) (No. 103) 23 N.Z.L.J. 183) referred to.

Sales at excessive prices, and appearing to be attributable only to the whim, extravagance, or compelling needs of individual purchasers, should be disregarded in the assessment of market value. There is, however, a distinction between an individual case where an excessive price is paid for personal reasons (since the price paid is out of line with market prices) and a general situation where the prices of houses are found to exceed replacement costs in consequence of an insistent and unsatisfied demand for homes (the price level being constituted by actual sales and following naturally from an excess of demand over supply). Supply and demand are factors in the determination, not only of price, but also of value; and the effect of demand upon the property market is not to be disregarded merely because it reflects in varying measure the needs of prospective buyers.

In 1940, a house was built at a cost of £1,134 9s. 5d., the section costing the further sum of £425. It was occupied by the owner and her family until her death on May 13, 1951, when the existing Government valuation was £1,760. The property was valued on a special valuation for death-duty purposes by the Valuation Department at £3,125.

The value, for the purposes of s. 70 of the Death Duties Act, 1921, was found by the Land Sales Committee to be the "replacement value" of the property—namely, £2,980 (allowing £840 for the land): *sub nom. In re Manning* (1952) 7 M.C.D. 479. That figure, merely as "replacement cost", was upheld by the Land Valuation Court.

The Valuer-General appealed from the Committee's decision, on the ground that the amount so found was not the true value of the property, and was not, in the circumstances, in conformity with the value required to be found under the Death Duties Act, 1921. More comprehensive evidence as to the selling value of the property at the date of the deceased's death was given before the Court than was given before the Committee.

*Held*, 1. That, although at the material date the replacement value of the property was £2,980, it could have been sold at that date at £3,125.

2. That the replacement value could not be accepted, as the evidence showed that a higher figure could have been obtained at the relevant date in the open market, since, both on principle and by virtue of the definition of "capital value" in s. 2 of the Valuation of Land Act, 1925 (now 1951), market value must take precedence over replacement value where there is shown to be a divergence between them.

3. That the unanimous agreement of the valuers that the deceased's property could have been sold at the date of death for £3,125 was conclusive evidence that that was the capital value of the property for the purposes of s. 70 of the Death Duties Act, 1921.

4. That, in view of the Valuation Department's method of assessment, and of its unusual course in presenting its case, the estate of the deceased should be reimbursed in part for its costs.

APPEAL by the Valuer-General against a decision of the Auckland No. 2 Land Valuation Committee upon an objection lodged by one Cecil Howard Manning against a special valuation made under s. 70 of the Death Duties Act, 1921 (7 M.C.D. 479). The property concerned was situated at 18 Masons Avenue, Herne Bay, Auckland, and was part of the estate of Agnes Robina Manning, who died on May 13, 1951. It comprised a dwellinghouse and the usual amenities, with 22 perches of land. The special valuation fixed a capital value of £3,125, comprised of unimproved value £840 and value of improvements £2,285.

10 The facts and a summary of the evidence appear in the judgment.

*Rosen*, for the Valuer-General.

*S. C. Clarke*, for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by

15 ARCHER, J. At the hearing before the Committee, Mr. I. McIndoe gave evidence for the Valuation Department and Mr. C. H. Webb for the

objector. These witnesses were both experienced valuers. They agreed on an unimproved value of £840, and, in valuing the improvements, both used the method of "replacement cost less depreciation", and with a considerable measure of agreement. By reason of his greater deduction for defects in construction, however, Mr. Webb's final figure for improvements was £2,130, as against Mr. McIndoe's figure of £2,285. The Committee accepted Mr. Webb's assessment with one small adjustment, and reduced the Department's valuation to:

Unimproved value	£840
Improvements ..	£2,140
	<hr/>
Capital value	£2,980
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On the hearing of the appeal from this decision, the value of the improvements on a replacement basis was again traversed by both parties, but upon this aspect of the case we are not persuaded that the Committee's decision should be amended. We accordingly hold that the "replacement value" of this property (allowing £840 for the land) is £2,980.

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The substantial ground of appeal, however, was that the amount so found was not the true value of the property, and was not, in the circumstances, in conformity with the value required to be found under the Death Duties Act, 1921. By subs. 5 of s. 70 of that Act, it is provided as follows:

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In this section the term "land" has the same meaning as in the Valuation of Land Act, 1908, and the term "value" means capital value as defined by that Act.

In s. 2, the relevant section of the Valuation of Land Act, 1925 (now 1951), we find:

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In this Act, if not inconsistent with the context—

"Capital value" of land means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realize at the date of valuation if offered for sale on such reasonable terms and conditions as a *bona fide* seller might be expected to require.

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It is acknowledged that at the relevant date for this valuation, May 13, 1951, there was a grave shortage of houses, and very high prices were commonly being paid, particularly where vacant possession could be given. The notes of evidence show that Mr. Webb said to the Committee:

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I am not suggesting that £3,125 could not have been got for it on the open market. Prices are well up in the air. If I had been asked what price to put on this property, I would have said £3,200 to £3,300, and would expect that figure to be obtained.

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Mr. McIndoe's evidence before the Committee included:

If advising a purchaser as to what to pay for the property, I would say: "My valuation is £3,125. Go and look at it. If you like it, pay up to £3,500, because, 'if you don't like it, someone else will.' Judging by prices being paid, I would say a purchaser would be making quite a good purchase at £3,500 by comparison with other places.

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It was on this evidence that the Department invited the Committee to confirm its valuation of £3,125, though it will be noted that its valuer arrived at this value by the replacement cost method, and, apart from the expression of opinion quoted, gave no evidence as to market value or as to actual sales as a basis for market value. The Committee held that its duty was to ascertain "the true value of the property for sale purposes", and that:

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the method best calculated to show the correct value under conditions such as exist to-day would be to assess the market value of the land (unimproved) and add to that the reasonable cost (less depreciation, &c.) of the improvements.

It found confirmation of this view in the fact that both valuers had used the method described and that the Department had placed no higher value on the property than its valuer's assessment of its replacement value. In rejecting the Department's contention, the Committee said : " It would not be equitable . . . in a case such as this to abandon conscientiously prepared replacement cost estimates, which may be made the subject of careful check, for the vagaries of mere ' opinion ' evidence unsupported by factual data " ( (1952) 7 M.C.D. 479, 482).

Before the Court, the issue of " market value " was developed on behalf of the Valuer-General with much greater care. Mr. McIndoe said that in May, 1951, the property would have brought £3,500. He acknowledged the discrepancy between this figure and his valuation of £3,125, and admitted that, in making his valuation, he had relied entirely on the replacement method. He maintained, however, that selling value was at the time in excess of replacement value, and that an amount for " sale-ability " should be added to replacement value, in order to arrive at market value. Why Mr. McIndoe had not done this when making his original valuation was not adequately explained, but he professed to have been wrong in failing to add something for " saleability ".

Mr. J. D. Mahoney, a senior officer of the Valuation Department, elaborated the contention that the market value of house properties was, at the relevant date, above replacement value, and assessed the difference at from 10 per cent. to 12½ per cent. Mr. Mahoney valued the property at £3,325, a figure arrived at by valuing it by the replacement method and adding 10 per cent. to the replacement value of the improvements. In support of his views as to the relationship between market value and replacement value, Mr. Mahoney submitted an analysis of sales of untenanted houses in Herne Bay and the adjoining district of Westmere, to show that the value of properties as indicated by actual sales was substantially higher than if calculated by the replacement method.

For the estate, evidence was given by Mr. E. L. Whelan, of the State Advances Corporation, and by Mr. C. H. Webb. Mr. Whelan said his Department had recently sold a large number of houses as mortgagees in possession. He said that these houses had first been valued by the replacement method, but he agreed that, in the Corporation's experience, houses in average residential areas, in fair repair, and with vacant possession, were generally saleable at from £200 to £300 in excess of their replacement value. Mr. Webb confirmed his evidence before the Committee, and his valuation of £2,970. He added, however :

The property would probably bring £3,200 in the open market at that time. If asked in May, 1951, what the property should have been sold for, I would have given that figure.

When asked to elaborate this statement, he said :

I am asked to make what I consider a fair valuation of this property. To arrive at that I must adopt a fair replacement value less depreciation. That is a fair value of that property. The question then comes up : What would a purchaser pay for it ? That is where I have the other set of figures. In my view the true value is shown by replacement cost, and any additional money is by way of premium. There is a general tendency to pay more than replacement value.

It will be seen that, as to the relationship between replacement value and selling value, these witnesses were substantially in agreement with the valuers called by the appellant.



More comprehensive and convincing evidence as to the selling value of the property at the date of death was thus before the Court than that which the Committee rejected as " ' opinion ' evidence unsupported by ' factual data ' ". The Department had been in difficulty before the Committee, when, depending on a witness who had relied solely on the replacement method, it sought to sustain his valuation by a belated reliance upon selling value in the open market. In these circumstances, it is little wonder that the Committee rejected its plea for a higher value than that which it found to have been established by the replacement method.

In accordance with the practice of this Court, however, we have to decide this appeal upon the evidence as presented at the hearing of the appeal. On that evidence, we are in agreement with the Committee that, at the date of death, the replacement value of the property was £2,980. We find, however, that the property could have been sold at that date at a higher figure. All the valuers and Mr. Whelan were in general agreement with that proposition, the respective estimates of selling value being: Mr. McIndoe, £3,500; Mr. Mahoney, £3,325; Mr. Webb, £3,200. Mr. Mahoney's method was to add 10 per cent. to his replacement value of improvements, and his analysis of actual sales appeared to indicate that 10 per cent. was not an excessive allowance. The addition of 10 per cent. to the Committee's valuation of the improvements would increase its total valuation from £2,980 to £3,194, a figure very close to Mr. Webb's assessment of selling value of £3,200, and higher than the valuation of £3,125, which is the subject of this appeal. On the evidence, we are bound to hold that the property could have been sold in May, 1951, for £3,125.

As appellant, the Valuer-General contends that a finding that the property was saleable at the relevant date for £3,125 is conclusive in his favour. The estate nevertheless maintains that the true value of the property at that date was its replacement value of £2,980. We have now to consider which is the correct basis of valuation, having regard to the definition of " capital value " contained in s. 2 of the Valuation of Land Act, 1925 (now 1951).

It is to be remembered that Mr. Webb qualified his evidence as to selling value by saying that, in his opinion, the true value of the property was shown by its replacement cost, and that any additional amount paid by a purchaser would be by way of " premium ". Mr. McIndoe also appears to have regarded his assessment of replacement value as the true value of the property, and appears to justify a higher selling price only on the ground that a prospective purchaser who offered only the replacement value would lose the property to someone prepared to pay more.

It is in reliance on these expressions of opinion that the estate claims that replacement value is the true value, and that any sum offered in excess of replacement value is not added " value ", but is a " premium " paid in consequence of the scarcity of houses and of the dire needs of prospective purchasers.

It is, of course, elementary that we must give full effect to the statutory definition of " capital value ". As was said by *Sir Robert Stout, C.J.*, in *Duthie v. Valuer-General* (1901) 20 N.Z.L.R. 585: " This definition is clear and specific, and it should be followed, whatever the results may be " (*ibid.*, 589).

It is true, moreover, that in terms the definition relates capital value to saleability at a hypothetical sale. *Hosking, J.*, said in *Thomas v. Valuer-General* ([1918] N.Z.L.R. 164): " The saleability of the estate

"or interest to be valued must be assumed as the basis" (*ibid.*, 173). And *Kennedy, J.*, said in *Valuer-General v. Wellington City Corporation* ([1933] N.Z.L.R. 855): "The sale is a hypothetical sale and the buyer is likewise fictional, because no person actually does buy" (*ibid.*, 866).

- 5 It is equally true, however, that the definition envisages by implication, not only a reasonable and *bona fide* seller, but also a willing and informed purchaser, and that the sum which a property may be expected to realize at any given date is dependent as much on what purchasers may be prepared to pay as on what a vendor may be inclined to ask.
- 10 We conceive that the definition is not intended to create a new standard of valuation for rating and duty purposes, but is intended to apply to valuations made for those purposes the conception of "fair market value" long established in English law and assessed by reference to a hypothetical sale between a willing seller and a willing buyer. Dicta as to "fair
- 15 "value" for the purposes of the Servicemen's Settlement and Land Sales Act, 1943, and as to the valuation of property for the purposes of compensation claims are accordingly relevant, in many cases, to the issue now before us.

- Thus, as to "fair value" under the Servicemen's Settlement and Land
- 20 Sales Act, 1943, in *In re Oriental Hotel, Muir to Niall* ([1944] N.Z.L.R. 512) *Finlay, J.*, held: "'value' means what, with all its advantages and disadvantages, the premises were worth to the owner on the critical date, assuming him to have been, at that date, a man of ordinary prudence and foresight, not anxious to sell for any compelling or private
- 25 "reason, but willing to sell as one businessman would to another, both of them being alike uninfluenced by any consideration of sentiment or need" (*ibid.*, 516).

- In the Australian compensation case, *Spencer v. Commonwealth of Australia* ((1907) 5 C.L.R. 418), there are numerous passages which
- 30 appear apposite to the issue in the present case. *Barton, J.*, said: "And I should say in view of the many authorities cited and upon the sense of the matter, that a claimant is entitled to have for his land what it is worth to a man of ordinary prudence and foresight, not holding his land for merely speculative purposes, nor, on the other hand, anxious
- 35 "to sell for any compelling or private reason, but willing to sell as a businessman would be to another such person, both of them alike uninfluenced by any consideration of sentiment or need" (*ibid.*, 436, 437). *Sir Samuel Griffith, C.J.*, said: "In my judgment the test of value of land is to be determined, not by inquiring what price a man
- 40 "desiring to sell could actually have obtained for it on a given date, i.e., whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it at a fair price but not desirous to sell?' It is, no doubt, very difficult to answer such a
- 45 "question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer
- 50 "for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together" (*ibid.*, 432). And *Isaacs, J.*, said: "the ultimate question is, what was the value of the land on January 1, 1905? All circumstances subsequently arising are to be ignored.
- 55 "Whether the land becomes more valuable or less valuable afterwards

"is immaterial . . . Prosperity unexpected, or depression which  
"no man would ever have anticipated, if happening after the date named,  
"must be alike disregarded. The facts existing on January 1, 1905,  
"are the only relevant facts, and the all important fact on that day  
"is the opinion regarding the fair price of the land, which a hypothetical  
"prudent purchaser would entertain, if he desired to purchase it for  
"the most advantageous purpose for which it was adapted . . .  
"To arrive at the value of the land at that date, we have, as I conceive,  
"to suppose it sold then, not by means of a forced sale, but by voluntary  
"bargaining between the plaintiff and a purchaser, willing to trade,  
"but neither of them so anxious to do so that he would overlook any  
"ordinary business consideration. We must further suppose both to  
"be perfectly acquainted with the land, and cognizant of all circum-  
"stances which might affect its value, either advantageously or pre-  
"judicially, including its situation, character, quality, proximity to  
"conveniences or inconveniences, its surrounding features, the then  
"present demand for land, and the likelihood, as then appearing to  
"persons best capable of forming an opinion, of a rise or fall for what  
"reason soever in the amount which one would otherwise be willing to  
"fix as the value of the property" (*ibid.*, 440, 441).

Numerous authorities have justified the use, in the valuation of  
improvements, of the replacement cost method. Thus, in *Valuer-  
General v. Wellington City Corporation* (1933) N.Z.L.R. 855), *Kennedy,  
J.*, delivering the judgment of the Court, held: "the Assessment Court  
"is entitled to take into consideration . . . the cost of erecting the  
"buildings upon the lands assessed. This does not mean that the Court  
"should necessarily fix capital value at costs, less proper allowances for  
"obsolescence and suchlike, but only that cost is a factor which may be  
"considered" (*ibid.*, 872, 873).

In the Land Sales Court, where frequently there was little evidence  
as to sales on or about the relevant date for valuation, December 15,  
1942, the replacement method was commonly relied on. In *D. to E.*  
(1944) (No. 1) 20 N.Z.L.J. 155), *Finlay, J.*, said: "The safer and better  
"course is to employ the basis of replacement costs, paying due regard  
"to the fact that a calculation of such costs is necessarily only approx-  
"imate and is at most an indication of the value which the Court has to  
"determine" (*ibid.*, 155). In *R. Estate to B. Co., Ltd.* (1947) (No.  
103) 23 N.Z.L.J. 183), the Court held: "It is perhaps desirable to reit-  
"erate that the duty of the Committee, and now of the Court, is to ascer-  
"tain the value of the property as at December 15, 1942, subject in a  
"proper case to increases or deductions which, however, do not appear  
"to be applicable to this case. It has been held that a vendor is en-  
"titled to the full value of his property and this is in general synonymous  
"in other than farm land with 'market value' and is the sum which the  
"vendor if willing but not over anxious to sell at the relevant date might  
"reasonably have expected to obtain in the open market for his property.  
"In the absence of a well defined 'market' for real property the market  
"value in any particular case must of necessity be arrived at by valu-  
"ation, which in turn may be based upon one or more of several recog-  
"nized and accepted methods of valuing. Of these methods none can  
"be claimed to be conclusive and it is conceived that where two or more  
"methods of valuation can properly be applied to a particular property,  
"the true value is most likely to be found by a critical comparison of the  
"results obtained by the application of all such methods as appear  
"appropriate. These general considerations are relevant to the present

"appeal as it would seem that all of the valuers called before the Committee relied entirely on what has been called the 'replacement cost' method of valuation—namely, that they first assessed the value of the land, then the replacement cost for the building at December, 1942, and by adding the two together and making deductions for depreciation purported to arrive at the value of the property. For reasons which will be later referred to, the Court is satisfied that this method in the present case is not an accurate guide to the 'market value', which is what is to be determined" (*ibid.*, 183).

10 It follows that the replacement cost method is not conclusive or infallible. It should be regarded, not as an alternative to market value, but as a factor to be considered in the assessment of a fair market value. Its advantages arise from the facility with which it may be examined and checked, and from its availability when it is impracticable to assess values by reference to actual sales. Its validity depends on the assumption that a prospective purchaser will not pay more for premises than it would cost him to build similar premises elsewhere. That assumption holds good only when the building situation is such as to give prospective buyers an effective choice as to whether to buy or to build.

20 It is well recognized that "price" is not synonymous with "value", and that sales at excessive prices, and appearing to be attributable only to the whim, extravagance, or compelling needs of individual purchasers, should be disregarded in the assessment of market value. The estate invites us to disregard the high prices generally paid for houses in 1951, on the ground that they were induced by the pressure of compelling need. We think, however, that a distinction must be drawn between an individual case where an excessive price is paid for personal reasons and a general situation where the prices of houses are found to exceed replacement costs in consequence of an insistent and unsatisfied demand for homes. In the former case, the price paid is out of line with market prices, and it is for that reason that the sale is disregarded. In the latter, the price level is constituted by actual sales, and follows naturally from an excess of demand over supply. We conceive that supply and demand are factors in the determination, not only of price, but also of value, and that the effect of demand upon the property market is not to be disregarded merely because it reflects in varying measure the needs of prospective buyers.

The estate's case appears to envisage two contemporaneous standards of value—namely, an intrinsic value determined by replacement cost, and a selling value dependent upon the state of the property market. Thus, its valuer, Mr. Webb, speaks of a "fair value", which he assesses on a replacement basis at £2,980, and of "what a purchaser would pay", which he assesses by reference to his knowledge of the market at £3,200. We can find no justification for such a distinction in the definition contained in the Valuation of Land Act, 1925 (now 1951). The definition limits our consideration to one thing only—namely, the amount which the property, if offered for sale on reasonable terms at the relevant date, might have been expected to realize. It follows that we are not entitled to give weight to certain factors which were mentioned in argument, and which may have weighed with the Committee. We are not concerned with the views or methods of the Valuation Department, save as to its method of assessing the market value of this particular property at the relevant date. Nor are we concerned with public policy, or with the incidence of death duties, and we are not entitled to take into account

the possibility of hardship which may result from the basing of a death-duty valuation on current selling prices.

The substantial issue in this case is whether the replacement value may be accepted notwithstanding that the evidence shows that a higher figure could have been obtained at the relevant date in the open market. The answer to this question is "No", for, both in principle and by virtue of the statutory definition, market value must take precedence over replacement value where there is shown to be a divergence between them. The unanimous agreement of the valuers that the deceased's property could have been sold at the date of death for £3,125 affords, we think, conclusive evidence on which we must hold that £3,125 is the capital value of the property for the purposes of s. 70 of the Death Duties Act, 1921. 5 10

In so holding, however, we wish it to be understood that it is the amount of the appellant's valuation which we confirm, rather than his Department's method of assessment. The association of the Valuation Department with these proceedings has been by no means a happy one. Before the Committee, it relied upon Mr. McIndoe to support a valuation of £3,125 based solely upon replacement cost. When the Committee reduced this valuation by the comparatively small sum of £145, the Department conceived that its original figure might be restored by the addition of a suitable sum for "saleability", and it appealed to test the validity of this somewhat novel proposal. Mr. Mahoney then advanced for the first time the theory that a percentage should be added to the replacement value. Mr. Mahoney's valuation of the property was £3,325, but the appellant asked no more than that Mr. McIndoe's figure of £3,125 should be restored. The appeal is entitled to succeed, because the evidence establishes a market value at the date of death of not less than £3,125. In fairness to Mr. Mahoney, we must acknowledge that his investigation of actual sales was comprehensive and thorough, and that it gave confirmation to the view that sale prices were, at the relevant date, above replacement cost. It has not been necessary, however, for us to consider whether Mr. Mahoney's method was acceptable for general use in the valuation of residential properties, and it should not be assumed that the Department could have sustained a valuation of £3,325. 20 25 30 35

The amount in issue in this appeal is small, and it is questionable whether an appeal would have been justified, save as a test case upon some point of law. The essential issue was not adequately presented before the Committee, and was in substance raised for the first time at the hearing of the appeal. In these circumstances, we think the estate should be reimbursed in part for the costs which it has incurred as a result of the unusual course followed by the Department. 40

We accordingly allow the appeal and restore and confirm the appellant's valuation, dated September 26, 1951, of £3,125, but we direct the Valuer-General to pay to the objector Cecil Howard Manning the sum of £10 10s. towards his costs. 45

*Appeal allowed.*

Solicitor for the Valuer-General : *Crown Solicitor* (Auckland).

Solicitors for the respondent : *Clarke, Burns, and Lowe* (Auckland).

## McKENNA AND GIFFORD v. PALMERSTON NORTH CITY CORPORATION.

SUPREME COURT. Palmerston North. 1952. August 14. FAIR, J.

*Municipal Corporation—By-law—Boarding-house Licence issued for Three Months instead of Normal Term of Twelve Months—Council's Decision founded on Fire Prevention By-law requiring Brick Buildings in Specified Area—Misuse of Powers relating to Supervision of Boarding-houses—No Sufficient Ground for Refusal under Relevant By-law—Court's Discretion exercised in Favour of Boarding-house Keeper—Council ordered to issue Full-term Licence without Prejudice to have Premises demolished.*

The City Council refused to issue a boarding-house licence to the plaintiffs for the usual period of twelve months, but issued one which was limited to three months. The reason given was the undertaking to the Council, given on April 16, 1946, by the plaintiffs and their landlord, that, in consideration of the Council's permitting temporary repairs to be done to the boarding-house, they would demolish it, or permit it to be demolished, at the expiration of three months' notice from the Council to that effect. The undertaking was given, not in relation to the conduct of the premises as a boarding-house, but as a condition of the Council's consent to repairs and alterations to the premises, which were necessary after a fire had destroyed a good deal of the interior, in material of a more combustible or less permanent nature than that which the by-laws might have required. The evidence showed that the premises comprised a well-conducted boarding-house, serving a useful purpose in the city.

On a notice of motion for a writ of mandamus to issue to the Corporation ordering the issue to the plaintiffs of a boarding-house licence for twelve months,

*Held*, 1. That, as the purpose of the Council in limiting the term of the boarding-house licence was to enforce compliance with the agreement of April 16, 1946, relating to fire prevention, such limitation was a misuse of its powers in respect of the control of boarding-houses; because the Council, by limiting the licence to three months, used powers given to ensure proper management and accommodation in boarding-houses to enforce what was really a fire-prevention by-law.

*Quinlan v. Mayor, &c., of Wellington* ([1929] N.Z.L.R. 491) applied.

2. That, as the Council had not exercised the duty for which the power in relation to boarding-houses was entrusted to it, the limitation of the term of the licence could not be justified in the circumstances; and, having regard only to the Council's duty with regard to the supervision of boarding-houses, there was no sufficient ground for refusing a full-term licence.

3. That, assuming (but not deciding) that the Court had a discretion to refuse the order, it should exercise it in favour of the plaintiffs, for the reason that they were in a different position, owing to the change in the housing situation in New Zealand, from that when the agreement as to demolition on three months' notice was entered into in April, 1946, and owing to the intervention of the Legislature to protect tenants although their leases had expired; and for the further reason that their appearance of refusing to adhere to their undertaking was not blameworthy to the degree that it might appear to be, having regard only to the terms of that undertaking.

*Seart v. South British Insurance Co., Ltd.* ([1916] N.Z.L.R. 137) distinguished.

*Quaere*, Whether the powers given in the defendant Corporation's By-law No. 1, cl. 171, allowing the City Council to waive compliance with its by-laws on certain conditions, extended to imposing a limitation on the term of a boarding-house licence, or whether the by-law was valid.

*Waldegrave v. Mayor, &c., of Palmerston North* ((1909) 29 N.Z.L.R. 223) referred to.

MOTION for a writ of mandamus ordering the defendant Corporation to issue to the plaintiffs a licence for their boarding-house for the year ending March 31, 1953.

The Rangitikei Private Hotel was a wooden building situated in what was known under the by-laws of the defendant Corporation as "the inner area". Clause 161 of the Palmerston North By-law No. 1 provided :

No person shall within the inner area erect alter add to renew or repair the external walls party walls or chimneys of any building with sheet metal or corrugated iron or wood or any combustible material except as is next hereinafter provided for repairs only.

A fire occurred in the Rangitikei Private Hotel in or about the month of July, 1945, as a result of which the plaintiffs applied to the defendant for permission to reinstate in non-fireproof material those portions of the premises which had been destroyed. The granting of that application would have meant the waiving by the defendant of the provisions of cl. 161 of By-law No. 1.

The defendant declined the application of the plaintiffs, but, later, after considerable negotiation between the plaintiffs, the defendant, and Porter Motors, Ltd., the defendant Corporation waived compliance with the provisions of cl. 161 of By-law No. 1 and issued a permit enabling the damaged portion of the premises to be reinstated in non-fireproof materials, in consideration of the plaintiffs and their landlord, Porter Motors, Ltd., entering into an agreement, in the following terms :

Palmerston North.

His Worship The Mayor, Councillors, Burgesses,  
City of Palmerston North.

Dear Sirs,

We the undersigned do hereby undertake and agree that in consideration of your permitting temporary repairs to be done to the Rangitikei Private Hotel to make good the damage done by fire

We will demolish or permit to be demolished the said Private Hotel immediately on the expiration of any notice from your Council, requiring such Private Hotel to be demolished, such notice however to be a three months notice to be given by your Council.

For Porter Motors Ltd.

K. A. Henderson	} Directors.
R. Porter	
M. McKenna	
R. Gifford.	

On April 1, 1952, the plaintiffs (having for the period expiring on March 31, 1952, been the holders of a licence issued by the defendant entitling them to use the premises as a boarding-house) applied for a licence to use the premises for the like purpose for the licensing period commencing on April 1, 1952, and expiring on March 31, 1953.

On May 28, 1952, the defendant issued to the plaintiffs a boarding-house licence, having endorsed upon it a receipt, dated May 28, 1952, for the annual licence fee paid by the plaintiffs. The licence, as issued, purported to license the plaintiffs pursuant to the provisions of the defendant's By-law No. 22 to use the premises as a boarding-house, subject to the provisions of the defendant's By-laws and the conditions set out in such licence, for a period expiring on July 9, 1952.

The defendant refused the plaintiffs' demand to issue to them a boarding-house licence for their premises for the full licensing period ending on March 31, 1953.

The plaintiffs alleged that the condition of the premises entitled them to a licence to use the same as a boarding-house pursuant to the defendant's By-laws for the period ending March 31, 1953.

- 5 The plaintiffs' premises were acknowledged by the defendant to be clean and well-conducted, and were at all material times full up to the limits of the licence granted to the plaintiffs. They served an urgent need in the City of Palmerston North for both permanent and temporary accommodation in times of acute shortage of housing and other accommodation.
- 10 The plaintiffs asked that a writ of mandamus issue commanding the defendant under the hand of its Town Clerk to issue to the plaintiffs without further fee a boarding-house licence licensing the plaintiffs to use the premises as a boarding-house until March 31, 1953.

- Hardie Boys*, for the plaintiff. On the facts, the Council is only a  
15 licensing authority; and, under its by-laws, it can refuse a licence only on the grounds that plaintiffs are not of good character, or that the building is insecure, or that it is being used in a disorderly manner. There is no such allegation here. The statement of defence admits that the main building conforms to the Council's requirements. The Council  
20 has given no reason why the remainder of the property fails to conform.

- A licence cannot be refused on other grounds, such as the undertaking given in April, 1946: *Jorgensen v. Minister of Customs* ([1931] N.Z.L.R. 127, 133), *Wanganui Borough Council v. Mitchell* (1898) 17 N.Z.L.R. 339, and *The Queen v. Scott* (1889) 22 Q.B.D. 481. The undertaking  
25 given in April, 1946, is explained in *Porter Motors, Ltd. v. McKenna* ([1950] N.Z.L.R. 8, 10, 1. 30).

- A. It was *ultra vires* the Corporation to impose such a condition. The only powers to order demolition arise under ss. 40, 47, 48, and 52 of the Health Act, 1920, and ss. 393 and 304 and the Eleventh Schedule  
30 of the Municipal Corporations Act, 1933, and s. 35 of the Municipal Corporations Amendment Act, 1948. No steps were taken under these sections. Even when repairs are made contrary to cl. 172 of the Corporation's By-law No. 1, the only authority is to order the part unlawfully repaired to be pulled down: *9 Halsbury's Laws of England*, 2nd  
35 Ed. p. 760, para. 1291, p. 767, para. 1300. The undertaking of April, 1946, was, therefore, "voluntary": *R. v. Dodds* ([1905] 2 K.B. 40, 56).

- B. If the undertaking was *ultra vires* the Corporation, it is no longer binding on the plaintiffs or enforceable by the Corporation by reason  
40 of the acts of the Council, which were inconsistent with the continued existence of the undertaking. The Council is estopped from asserting its existence by a series of acts over the years which showed that it had jettisoned the undertaking, and, instead, had elected to enforce the Housing Improvement Regulations, 1927, to compel the tenant to bring  
45 the premises up to the same standard as a new boarding-house: *Everest and Strode on Estoppel*, 2nd Ed. 365, 436.

- C. So far as the Council is assisting the landlord, the undertaking is void under s. 47 of the Tenancy Act, 1947, as a covenant contracting out of the benefits of the statute.

- 50 *J. A. L. Bennett*, for the defendant Corporation. A. The Council is entitled to exercise its rights under the undertaking of April, 1946, into which plaintiffs entered with their eyes open. The Council can



waive compliance with its by-laws on such terms as it sees fit: cl. 171 of By-law No. 1.

B. The proceedings are not brought in good faith, but are brought to escape the plaintiffs' contractual obligations: *Searl v. South British Insurance Co., Ltd.* ([1916] N.Z.L.R. 137, 143).

C. The plaintiffs, on their own admission, have benefited by retaining possession much longer than they expected; and the Council has only suspended its enforcement of the undertaking while the landlord had no building permit. Suspension is not abandonment: *Panoutsos v. Raymond Hadley Corporation of New York* ([1917] 2 K.B. 10473). A defence under the Tenancy Act, 1948, can be relevant only as between landlord and tenant.

D. The remedy asked for should be merely to order the Council to hear and consider the application.

*Hardie Boys*, in reply. When the undertaking was entered into, the plaintiffs were not protected by the tenancy legislation, which became applicable to business premises only by reason of the Economic Stabilization Emergency Regulations, 1946 (Serial No. 1946/184). The plaintiffs have acted in good faith, because it is the Corporation which raises the undertaking as a defence. The plaintiffs are liable to a fine of £5 per day for the continuing offence of carrying on their boarding-house without a licence since July 9.

*Cur. adv. vult.*

FAIR, J. (orally). This action involves questions that are obviously of some difficulty, and requires consideration of different aspects of the law, but I have a clear mind on what the legal position is, and I see no advantage in reserving my decision.

The sole question is whether the City Council was justified in refusing to issue a boarding-house licence for the usual period of twelve months because of the undertaking given by the plaintiffs in April, 1946. That undertaking was to agree to the demolition of the building in which the boarding-house was being carried on on three months' notice being given them by the City Council requiring this demolition. At the time it was given, there was less complete control over boarding-houses than there is to-day, but the undertaking was given, not in relation to the conduct of the premises as a boarding-house, but as a condition of the City Council's consent to repairs and alterations to the premises, necessary after a fire had destroyed a good deal of the interior, being carried out in material of a more combustible or less permanent nature than that which the by-laws might have required.

So far as this case is concerned, it does not appear to me necessary to decide whether the powers in cl. 171 of By-law No. 1 allowing the City Council to waive compliance of its by-laws on certain conditions extend to imposing such conditions as this, or whether the by-law is valid: *Waldegrave v. Mayor, &c., of Palmerston North* ((1909) 29 N.Z.L.R. 223). Whether it was *ultra vires* or not I do not think it is necessary to decide. If it is valid, it certainly is the very limit of the Council's power. If there is such a power, it would appear possible, at least, that, when it is imposed as a condition where there is no immediate or strong justification for it, it might be so unreasonable a condition as to be invalid, because the Courts have to recognize, as the local bodies should

recognize, that very often an individual in dealing with a local body is in the unfortunate position of having to make the best bargain he can. He may well consent to something in the hope that things may improve or conditions may change, and, in any case, he may not be in a position to do otherwise than comply with the condition imposed by the local body, if it insists upon it. However, that matter, as I say, does not require to be decided here.

The Court does not need to traverse the history of the matter (partly set out in *Porter Motors, Ltd. v. McKenna* ([1950] N.Z.L.R. 8)) and does not need to relate that the landlord of the premises (*Porter Motors, Ltd.*), now it has obtained a permit to build, is anxious that the premises should be given up by the tenant and demolished, to enable it to rebuild on the site, presumably, of the premises. It sought to obtain possession, and that was denied it, the plaintiffs being held protected by the tenancy legislation. Then it sought to invoke the assistance of the City Council to obtain the enforcement of compliance by the plaintiffs with the undertaking given in April, 1946. I should say that throughout the City Council has obviously tried to hold the balance fairly between both parties, and has apparently acted reasonably in the past. I do not attach so much importance as I was disposed to at one time to their making requests as to improvements in the boarding-house during recent years, and particularly between 1946 and 1949, and in 1949, because, even if the building was liable to come down on three months' notice while it was being used as a boarding-house, it was proper that the City Council should see that it was kept up to standard, and that the requirements of the law with regard to bathrooms and sanitary conveniences should be carried out. A tenant who is carrying on the business on what might have been, or might be, a precarious tenancy has still got to comply with the requirements of the law and the health requirements; and so that, in itself, is not a matter, I think, that should prejudice the City Council. But I do think that there is some force in the view that to give the plaintiffs three months' notice is in itself rather rigid, and that, if the Council had been contemplating taking that course, or if it had definitely made up its mind to take that course, it should give as full warning as can reasonably be given. But that is only a tentative opinion, because one has to know all the facts before one can express a definite or decided opinion on the matter.

However, where I think the City Council has gone astray is in seeking a solution of the unusual situation in which it finds itself as a result of this condition or agreement and the change for the worse in the housing situation in New Zealand between 1946 and 1952. It sought to enforce compliance with that agreement by using its powers given in respect of the control of boarding-houses. It does seem to me that to refuse a licence for the usual term, when all the conditions that would normally be required to justify the licence being granted exist, in order to compel compliance with an agreement, is to use the powers given for one purpose for another purpose—i.e., to enforce rights or duties in respect of a different area of authority. In this case, it would appear that what the City Council has done by limiting the licence to three months is to use powers given to ensure proper management and accommodation in boarding-houses to enforce what was really a fire-prevention by-law requiring brick buildings within a certain area, or repairs to be made in permanent material in certain areas or under certain conditions.

The law is clear that provisions given to a local body for one purpose only cannot be used to effect another purpose for which they were never

intended to be used. There are many cases on that subject. One, as I said during the hearing, relates to the Palmerston North Borough Council at an earlier date. Of course, the obvious illustration is, if the Council is intending to take the land on which a boarding-house stood, then it cannot use that as a reason for refusing a licence in order to lessen the price. That would be an improper use of its right to grant a boarding-house licence: *Quinlan v. Mayor, &c., of Wellington* ([1929] N.Z.L.R. 491). In a much smaller degree, the use of power given for one purpose in order to forward the achievement of other purposes, in respect of which the Legislature never intended the power to be used, is an unauthorized exercise of the power. So I hold that, as the purpose in limiting the term of the licence was to enforce an agreement relating to ensuring, and designed to ensure, fire prevention, and not the exercise of the duty for which the power was entrusted to it, that limitation cannot be justified in the circumstances. There seems no doubt from the evidence that there was no sufficient ground for refusing it, having regard only to the Council's duty with regard to the supervision of boarding-houses.

I should say that I appreciate, too, Mr. *Bennett's* argument that it might have been considered by the Council that a grant for a longer term might prejudice its claim when it came to proceedings in respect of demolition; but that, I feel, could have been met by issuing the licence without prejudice to the Council's rights in respect of its claim to have the property demolished. The Court wishes to make it clear that it issues the order without prejudice to any rights that the City Council may have in respect of having the premises demolished.

The Court has regard, too, to the fact that really the Council seems to have acted at the request of the landlord. Although it no doubt desires to be as fair as possible, and did consider the plaintiffs' claims fairly during their occupancy from 1946 until the present year, yet the Council has not shown in these proceedings that there is any real necessity for the demolition at the present stage, and, indeed, the building is in a position not very different from that of a number of other buildings in the city with regard to fire risks, either in relation to its occupants or in relation to other buildings in the vicinity. That being so, I hold that the Council should have issued the licence. But I am asked to exercise the discretion of the Court in refusing the Court's assistance, on the ground that the circumstances do not entitle the plaintiffs to ask for what is an equitable remedy, given only to persons entitled to it on fair grounds apart from strict legal rights.

I do not intend to decide whether or not the Court has a discretion to refuse the remedy in these circumstances. It may be that the decisions in the Courts of Equity have established that this is a writ that should go *ex debito justitiae* where it is clear that a plain duty has not been performed, unless there is the gravest misconduct or lack of good faith on the part of the plaintiff. But, assuming that the Court has a discretion, it thinks it should exercise it in favour of the plaintiffs, for the reason that they are now in a very different situation, as they indicated during the argument, from that when the agreement as to demolition on notice was entered into in April, 1946. What would appear to be on their part a refusal to adhere to an undertaking given by them is not blame-worthy to the degree that it might appear to be, having regard only to the terms of that undertaking.

First, the Court refers to the fact that, as mentioned earlier, in a situation of that sort tenants who are occupying a particular house, and

who are, perhaps, not in good financial circumstances, very often have to submit to a condition that, if they were in a better position to bargain, they might resist very strongly; and I have no doubt that the situation here in 1946 was much of that kind.

- 5 Then, the Court has regard to the fact that, when this undertaking was entered into, as everybody knows, there was not the same shortage of accommodation in every part of New Zealand as there is now, and it was not realized that there would be a housing shortage of an acute kind in a very short time. The agreement would, one can infer, be entered  
10 into upon the basis that all parties—the City Council, the landlords, and the tenants—assumed that, by using proper energy and activity, the plaintiffs might reasonably find another boarding-house within three months. That position has changed now, and the Court is entitled, I think, to look at the fact that the situation is so altered, and the housing  
15 shortage so acute, that the Legislature has intervened to protect businesses in the occupation of their tenants although their leases have long expired, and has conferred equitable rights on them in a most generous way.

- That, I think, is the most *egent* factor in considering the equities in relation to the plaintiffs in this case. The evidence has been that it is a  
20 well-conducted boarding-house, and obviously serving a very useful purpose in the city, and, unless there are clear reasons why the Court should refuse the plaintiffs assistance to enforce what it has held to be, on this proceeding, in relation to this licence, a legal right, it should be granted. The Court will accordingly grant it and direct that the City  
25 Council issue to the plaintiffs a licence continuing their licence for the balance of the twelve months for which it would normally have been granted—i.e., from July 10 to March 31, 1953—upon the usual terms and conditions. That order is made, but without any prejudice to whatever legal rights may exist in the City Council as a result of the undertaking  
30 given in April, 1946.

- I should add that I have had occasion to consider *Searl v. South British Insurance Co., Ltd.* ([1916] N.Z.L.R. 137). I have not overlooked that decision. *Searl's* case, of course, was one where the plaintiff was seeking to nullify the explicit terms of a legal contract—a very  
35 different case from this.

The plaintiffs are entitled to twenty-five guineas costs.

*Mandamus accordingly.*

Solicitors for the plaintiffs: *Hardie Boys, Scott, and Haldane* (Wellington).

Solicitors for the defendant: *Cooper, Rapley, Rutherford, and Bennett* (Palmerston North).

## CONNOLLY *et Ux. v.* PALMERSTON NORTH CITY CORPORATION.

SUPREME COURT. Palmerston North. 1952. August 13; October 28.  
FAIR, J.

*Municipal Corporation—Laying Drains through Private Lands—Council's Hearing of Objections—Decision Quasi-judicial—Requirements of Natural Justice to be satisfied—Objectors to be present and to have Fair Opportunity to present Case and reply to Opposing Statements—Municipal Corporations Act, 1933, Ninth Schedule, cl. (d).*

Clause (d) of the Ninth Schedule to the Municipal Corporations Act, 1933, which relates to objections by occupiers of lands through which it is proposed to lay a drain, provides as follows:

"(d) The Council shall hold a meeting on the day so appointed and may, after hearing any person making such objection, if present, determine to abandon the work proposed, or to proceed therewith, with or without such alterations as the Council thinks fit."

The decision is to be made by the whole Council, as the body to hear the objection, is a quasi-judicial one; and, in such an inquiry, any evidence or arguments additional to those which the Council has already considered should, in general, be presented in the presence of the objector.

The general rule as to such procedure is that it must satisfy the requirements of "natural justice" by giving a fair opportunity to each party to present his case, including a right to reply to statements made by an opposing party at the hearing.

*Board of Education v. Rice* ([1911] A.C. 179) and *Local Government Board v. Arlidge* ([1915] A.C. 120) followed.

*Errington v. Minister of Health* ([1935] 1 K.B. 249) referred to.

The plaintiffs received notice in writing of the Council's intention to construct a drain through their land, and they served on the Council a written objection to the work. At the appointed hearing by the Council of the objection, the first-named plaintiff, the husband of the second-named plaintiff, was given an opportunity of stating his objection, and he was represented by counsel. After they had been heard, they withdrew. The Council then heard a written and verbal report from the City Engineer. No matters were raised, or brought before the Council, by the City Engineer or by any other person, of which the plaintiff first-named had not been aware before the hearing of his objection. The plaintiffs were not present when the City Engineer's report was made, and they had no opportunity of answering or otherwise commenting on it after it was made. The Council, after full consideration and discussion, determined by resolution to proceed with construction of the drain.

On application by the plaintiffs for an order restraining the defendant Corporation from proceeding with the construction of the proposed drain through their property,

*Held*, 1. That the plaintiffs were entitled to have a hearing by the Council of their objections, at which they would be given the opportunity of hearing the written and verbal report of the City Engineer either on the objections made by them, or, possibly, on the fresh alternative proposals that they adduced at the hearing of the objection.

*Errington v. Minister of Health* ([1935] 1 K.B. 249) applied.

2. That the plaintiffs were entitled *ex debito justitiae* to a writ of prohibition, the smallness of the matters in dispute not being in itself a ground for refusing to grant it.

The defendant Corporation was prohibited from proceeding with the construction of the drain until the plaintiffs' objection had been duly heard and determined in accordance with the requirements of the law; and a mandamus was issued commanding it to fix the time for such fresh hearing.

MOTION for an order restraining the defendant, or its servants, or agents from proceeding with the construction of a drain through their private property, or for such further and other relief as might seem just. The facts relating to the circumstances were somewhat meagrely stated in the application and the affidavits, but the learned Judge said that the following statement of the position might be inferred from their general tenor.

The defendant, desiring to provide an underground sewage drain for a housing subdivision within the city area, proposed to lay a portion of it through the plaintiffs' land as being the most convenient and economical way of doing the work. It complied with cls. (a) and (b) of the Ninth Schedule, notice being given to the plaintiffs in terms of cl. (b) on April 22, 1952.

On May 21, the plaintiffs served on the Council a written objection to the work, upon the following grounds:

- (a) That the proposed drain was not a "public drain".
- (b) That, even if the proposed drain were a public drain, the said drain was not required for the efficient drainage of the area affected thereby.
- (c) That the Council had not given any or any adequate consideration to alternative means of providing sewerage for the sections to be served by the proposed drain.
- (d) That the construction of the proposed drain would affect detrimentally their use and enjoyment of the said piece of land.
- (e) That the construction of the proposed drain would depreciate the value of the piece of land and appreciate the value of the land served by the proposed drain.

The defendant appointed Monday, June 23, at 7 p.m. as the time and place for the hearing of the objection, and the statement of claim alleged that "the said objection . . . was duly heard by the defendant on the date".

On or about July 2, 1952, the plaintiffs were advised by the defendant that it had determined to proceed with the construction of the drain in question. The plaintiffs claimed that such determination was:

- unreasonable in all the circumstances in that:
- (a) The defendant did not act judicially in determining the objection of the plaintiffs.
  - (b) The defendant did not have adequate evidence upon which to make such determination.

Upon the argument before the Court, the second ground was not relied on, and the plaintiffs relied wholly on the first.

*Gilliland*, for the plaintiffs.

*J. A. L. Bennett*, for the defendant.

*Cur. adv. vult.*

- FAIR, J.** [After stating the facts, as above:] Sections 222 and 223 (1) of the Municipal Corporations Act, 1933, so far as they are relevant to the present action provide as follows:

222. (1) The Council of every borough shall, within two years from its constitution, cause a map to be made showing the course and levels of all drains made or intended to be made for the efficient drainage of the borough; and may from time to time cause any new drains, or any alteration of existing drains found to be necessary, to be marked on such map.

(2) The drainage-map shall be open for public inspection at all reasonable hours at the office of the Council.

223. (1) The Council may cause to be constructed, of such dimensions and such materials as it thinks fit,—

(a) Upon or under the streets and public places within the borough all such drains as are from time to time shown on the said map, and until such map is made all such drains as the Council from time to time thinks needful for the efficient drainage of the borough: 10

(b) Upon or under any private lands or buildings within the borough all such drains as aforesaid, subject, however, to the conditions set out in the Ninth Schedule hereto: 15

Provided that it shall not be lawful for the Council to make any drain upon or under any private lands or buildings, other than an underground covered drain, unless the permission in writing of the owners has been first obtained.

The Ninth Schedule provides as follows: 20

#### CONDITIONS OF LAYING DRAINS THROUGH PRIVATE LANDS.

Before the Council constructs any drain through or upon any private lands the following conditions shall be complied with:—

(a) A plan and description of such drain, showing how it affects any such lands, shall be deposited for public inspection at some place within the borough. 25

(b) The Council shall give notice in writing to the occupier of such lands and also to the owner when known, of the intention to construct such drain, and shall refer in such notice to such plan and description, and state where the same are on view.

(c) If within one month after such notice is given the said occupier or owner serves on the Council a written objection to the proposed work, the Council shall appoint a day for hearing such objection, and shall give notice of the same to the objector. 30

(d) The Council shall hold a meeting on the day so appointed, and may, after hearing any person making such objection, if present, determine to abandon the work proposed, or to proceed therewith, with or without such alterations as the Council thinks fit. 35

From affidavits filed, it appears that, before the hearing of the objection, an officer attached to the Engineering Department interviewed and conferred with the first-named plaintiff (who is the husband of the second-named plaintiff) on two occasions, on one being accompanied by the City Engineer and a City Councillor; and that he was then made fully aware of the reasons why the City Engineer had recommended the construction and laying of the drain through the property of the plaintiffs. Counsel agree, however, that, when the objection was heard before the Council, some alterations then suggested by the plaintiffs were put forward for the first time. 40 45

At such hearing, the plaintiff was given an opportunity of stating his objection, and was represented by counsel. The Mayor, who presided, asked him a series of questions apparently intended to indicate that the drain was very necessary for the purposes of the housing subdivision, that any alternative would be a much longer and more expensive route, not wholly underground, and that he would be assured of the pipes being put beneath the surface and any damage done to his property being made good. It was also suggested that his property might be more depreciated unless the sewage disposal was dealt with in this way 50 55

rather than by a night-soil cart. It does not appear from the affidavits what answers were given to these questions, or whether any discussion took place in relation to them.

- After Mr. Connolly and his counsel had been heard, they withdrew, 5 and thereafter the City Council heard a written and verbal report from the City Engineer, who was present at the meeting. No matters were raised or brought before the Council by the City Engineer or by any other person of which the first-named plaintiff had not been made aware before the hearing of his objection. After full consideration and discussion of the whole matter, the Council passed the following resolution : 10

That having considered the representations made on behalf of Mr. and Mrs. Connolly this Council is now determined to proceed with the construction of the drain.

- The plaintiffs were not present when the City Engineer's written and 15 verbal report was made, and had no opportunity of answering it, or otherwise commenting on it, after it was made.

- It was argued on behalf of the plaintiffs that the function of the Council, when hearing an objection under the Ninth Schedule, was quasi-judicial, and that at least the whole of the oral evidence to be 20 considered by the Council should have been given in the presence of the plaintiffs, with full opportunity to them to hear it and to ask questions bearing upon its weight and relevance. Reliance in support of this view was placed on the decisions in the House of Lords in *Board of Education v. Rice* ([1911] A.C. 179) and *Local Government Board v. Arlidge* ([1915] A.C. 120), and particularly upon the statement by Lord Loreburn, L.C., in *Board of Education v. Rice* ([1911] A.C. 179), which has been 25 frequently referred to in later cases, in which he said that administrative tribunals of this type "need not examine witnesses. They can obtain "information in any way they think best, *always giving a fair opportunity* 30 "*to those who are parties in the controversy for correcting or contradicting* "any relevant statement prejudicial to their view" (*ibid.*, 182).

- It is to be noted that the Ninth Schedule requires the Council to appoint a day for *hearing* the objection. It also requires it "after 35 "*hearing any person making such objection, if present, [to] determine* "to abandon the work proposed, or to proceed therewith, with or without "such alterations as the Council thinks fit". This phraseology differs from that conferring such duties and powers on other similar tribunals in England and elsewhere, inasmuch as it does not in terms constitute the hearing of the objection an "inquiry". The use of that term 40 definitely indicates the taking of evidence rather than a verbal statement of objections by the person affected. It is a possible construction of cl. (d) of the Schedule that all the Council is required to do under the Schedule is to hear the objectors, and thereafter determine the matter upon weighing their objections. In most cases, it would be inappropriate to consider evidence of elaborate alternative schemes of drainage. These are matters very often involving highly technical requirements, the decision upon which, in the interests of the ratepayers as well as of the objector, has to be determined by the local body constituted to 45 protect the general interest : see *Perth Local Board of Health v. Maley* (1904) 1 C.L.R. 702, 715). But in the great majority of cases probably no such questions would arise : and the provisions of the Schedule may well have been intended to allow an owner of property to suggest a simple alternative that might either avoid his property being used at all 50



or indicate a method that might equally well be adopted in using it, but with less damage to his property or less in conflict with his wishes.

On the other hand, the Schedule appoints the whole Council as the body to hear the objection and make a decision that may result in the abandonment of the work proposed, or its alteration. Such a decision seems to me a quasi-judicial one. No doubt the Council has to take into account the costs of the work and the interests of the ratepayers, but it is bound also to give judicial consideration to any reasonable objections and any reasonable alternative proposals, at least of a simple nature, offered by the objectors. If these had already been considered by the Engineer and the Council, the objector would generally be informed as to this, so as to allow him to comment on them.

Practical considerations demand that the proceedings should be kept within reasonably concise limits, as it is a matter of common knowledge that any local body of considerable size has many detailed duties to carry out which it is required to deal with expeditiously and in a business-like way. But these considerations do not detract, in my view, from the main ground relied on by the plaintiffs that the Schedule contemplates a quasi-judicial tribunal. In such an inquiry, any evidence or arguments additional to those which the Council already has considered should, in general, be presented in the presence of the objector. That seems to be established by the two cases cited; and it has been applied with some hesitation in *Errington v. Minister of Health* ([1935] 1 K.B. 249), where *Maugham, L.J.*, said: "My conclusion is that although the act of affirming a clearance area order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration, and the Minister is bound to the extent mentioned by the House of Lords in the *Board of Education v. Rice* ([1911] A.C. 179)" (*ibid.*, 273); and see also, *Roche, L.J.* (*ibid.*, 280).

The Court of Appeal held that, where objections taken to a clearance order made by a local body were being considered by the Ministry of Health, it was exercising quasi-judicial functions. It said that, in performing those functions, the Ministry of Health did what a semi-judicial body cannot do—namely, it heard evidence from one side in the absence of the other; it viewed the property and formed opinions about it without giving the owners an opportunity to argue that the views which the Ministry were inclined to take could be readily dealt with by repairs (*ibid.*, 264). It was held that the Ministry thereby offended against the principles of natural justice by hearing one side in the absence of the other, and the confirming order was quashed.

The whole question of reconciling the combination of administrative and judicial functions in the same body and combining efficiency in the conduct of local-body affairs with adequate protection for private rights is dealt with very clearly, and the recent cases collected, in *Robson on Justice and Administrative Law*, 2nd Ed. 378-410.

In the article on "Quasi-judicial' and Its Background" (1949) 10 *Cambridge Law Journal*, 216), there is a valuable examination of the case law on these questions and an illuminating analysis of them by Mr. H. W. R. Wade. His view is largely summarized in a passage which I think correctly states the principles to be deduced from the decisions up to that of *Franklin v. Minister of Town and Country Planning* ([1948] A.C. 87; [1947] 2 All E.R. 289) (the *Stevenage* case). At p. 228, he says:

Before the decision can be properly taken, facts have to be ascertained and private interests, if they are likely to be affected, must be considered. It is this

preliminary stage, and this stage only, which is "quasi-judicial". The term applies only to the procedure which the Minister is required to follow before he is free to exercise the unfettered discretion conferred upon him by the Act. (Note 43. This is clearly stated by *Maugham, L.J.*, in *Errington v. Minister of Health* ([1935] 1 K.B. 249, 273): "My conclusion is that although the act of affirming a clearance order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration . . ." Professor Robson (394) adopts Sir L. Jennings's view that this shows the absurdity of the language used to describe the powers given by administrative law. According to the analysis which I prefer to follow, it is one of the most helpful judicial statements in the reports. There are now two others, no less clear, (i) in *Robinson v. Minister of Town and Country Planning* ([1947] K.B. 702, 716, where *Lord Greene, M.R.*, said: "To say that in coming to his decision he [the Minister] is in any sense acting in a quasi-judicial capacity is to misunderstand the nature of the process altogether. I am not concerned to dispute that the inquiry itself must be conducted on quasi-judicial principles. But this is quite a different thing from saying that any such principles are applicable to the doing of the executive act itself, that is, the making of the order. The inquiry is only a step in the process which leads to that result"; (ii) in *Johnson and Co. v. Minister of Health* ([1947] 2 All E.R. 395, 400), where *Lord Greene, M.R.*, repeated the substance of what is quoted above.)

The general rule as to this procedure is that it must satisfy the requirements of "natural justice". This is a concept which the Courts have evolved and which means, essentially, that the Minister must allow any interested party to state his objections and that any such objections must be disposed of with at least an outward appearance of detachment and objectivity. This is not a cynical description of the process, nor is it intended to be derogatory. It has to be remembered that when the Minister has threaded his way through the forms required by the law, he is a free agent as to his final decision. The whole theory of "natural justice" is that Ministers, though free to decide as they like, will in practice decide properly and responsibly once the facts have been fairly laid before them. At any rate, this is the utmost that the law can do to control the exercise of their discretion without invading the forbidden realm of policy. Arbitrary exercise of an administrative power the Courts cannot control, for policy is in the last resort arbitrary. But much can be done to prevent an appearance of arbitrariness, and since in practice it is far more likely to be accidental than intentional, a procedure which satisfied "natural justice" is the best insurance against such accidents. To those who think that our Courts might have been more enterprising in controlling administrative powers I would venture to suggest that the manner in which our Courts have developed "natural justice" and fastened it onto powers which are purely political is really a remarkable achievement.

Once it is appreciated that judicial control is in this class of case confined to procedure prior to the final decision of policy, it is easier to understand the limits of the doctrine of "natural justice".

The decision in the *Stevenage* case does not, I think, extend to overrule the principles laid down by the House of Lords in *Rice's* case ([1911] A.C. 179) and *Artidge's* case ([1915] A.C. 120) and those following them.

In the circumstances of the present case, it appears that the plaintiffs complain of a denial of natural justice as defined in *Rice's* case ([1911] A.C. 179), in that they were not given the opportunity of hearing the written and verbal report of the City Engineer, either on the objections made by them or, possibly, on the fresh alternative proposals that they adduced at the hearing of the objection, and that they are entitled to have a hearing at which they will be given that opportunity, and the opportunity of commenting on it.

Their main ground in the objections urged by them seems to be that stated in the second affidavit filed by Mr. Connolly:

That the drain proposed by the defendant is considered by it to be the most convenient and economic drain, which factors the plaintiff says are not sufficient to justify interference with the rights of himself and his wife when alternative means of effecting the drainage are available.

From the scantiness of their evidence before this Court, it does not

seem very probable that the plaintiffs will be able to satisfy the Council that their objections are weighty enough to justify an alteration in the work proposed. But, the plaintiff's objections not having been heard and determined in the manner required by law, the plaintiffs must be regarded as being *ex facie* entitled to a rehearing if they desire it. The passage in the judgment of *Maugham, L.J.*, in *Errington's case* ([1935] 1 K.B. 249) seems apposite. He there says: "The only question that remains is whether the Court should come to the conclusion that the interests of the applicants have been substantially prejudiced by what has been done, because the quashing of the order is, of course, a matter of discretion of the Court. I do not think it has been proved that the statements which were made to the Ministry in fact affected the decision of the Minister, or of his officials, and I certainly have no reason to doubt that the officials were acting in what they thought to be the public interest. On the other hand, it seems to me a matter of the highest possible importance that where a quasi-judicial function is being exercised, under such circumstances as it had to be exercised here, with the result of depriving people of their property, especially if it is done without compensation, the persons concerned should be satisfied that nothing unfair has been done in the matter, and that *ex parte* statements have not been heard before the decision has been given without any chance for the persons concerned to refute those statements. That seems to me a matter of the greatest possible public importance, and if I am right in the view that I have expressed as to the functions of the Minister being of a quasi-judicial character, I think it follows that in the special circumstances of this case, as I understand them to be, the Court has no option but to quash the order, as my brother has suggested" (*ibid.*, 279, 280). Moreover, the writ of prohibition is *ex debito justitiae*, and the smallness of the matters in dispute has been held not in itself a ground for refusing to grant it: *9 Halsbury's Laws of England*, 2nd Ed. 819, para. 1396.

I have given full consideration to the submissions on behalf of the Council that *Arlidge's case* ([1915] A.C. 120) and those following it establish that the Council need not follow the methods adopted by the Courts, but may employ any methods for the transaction of business consonant with fairness and equity: "The Development of Administrative Law in England" by A. V. Dicey in (1915) *31 Law Quarterly Review*, 148, 149. But the rule that a fair opportunity must be given to each party to present his case must invariably be applied, and this generally applies to include a right to reply to statements made by an opposing party at the hearing: *The King v. Housing Appeal Tribunal* ([1920] 3 K.B. 334). The fact that the plaintiffs had been given the reasons already by the City Engineer and by Mr. Baker, although it lessens the objections to such a course, does not satisfy the essentials of a judicial hearing before the Council, even though little or nothing was added to what had already been said by and to the plaintiff.

*Feilding Club, Inc. v. Perry* ([1929] N.Z.L.R. 529), relied on by Mr. Bennett, deals with the management of the affairs of the club, and, in my view, involves many factors not present in this case. *Morten v. Nicoll* ([1932] N.Z.L.R. 685) is also, I think, a very different type of case.

Any material offered in answer to plaintiff's objections was part of the hearing of them, and should have been presented in his presence. The City Council should give the plaintiffs fresh notice under the Ninth Schedule for the hearing of their objections, and should proceed to hear

and determine them on the material in their possession before the first hearing, together with the additional evidence or reports adduced in the presence of the plaintiffs or their representatives at the fresh hearing. It will be prohibited from proceeding with the construction of the drain until the objection of the plaintiff has been duly heard and determined in accordance with the requirements of the law; and a mandamus will be issued that it fix a time for such fresh hearing. It might be well for the substance of the Civil Engineer's written and verbal report after the last hearing to be supplied to the plaintiffs before such hearing.

- 10 The Court feels that, if there were substantial grounds for considering the plaintiffs were being harshly or unfairly dealt with, they would be entitled to the full costs of this application. It does appear, however, that they have been given a reasonable hearing, although it has not complied with the requirements that the law demands must be observed in such a case. The plaintiffs have succeeded without proving by their evidence before the Court any specific substantial grounds for their objection, and as a result of the importance the law attaches to quasi-judicial tribunals complying strictly with the essential requirements for a judicial hearing. In such circumstances, the Court considers that only moderate costs should be allowed them, and these are fixed at £15 15s. and disbursements.

*Orders accordingly.*

Solicitors for the plaintiffs: *Jacobs and Grant* (Palmerston North).

Solicitors for the defendant: *Cooper, Rapley, Rutherford, and Bennett* (Palmerston North).

### *In re* AUCKLAND HARBOUR BRIDGE COMMISSION.

SUPREME COURT. Auckland. 1952. May 28, 29, 30; October 3. NORTHCROFT, J.; FINLAY, J.; STANTON, J.; NORTH, J.

*Statute—Construction—Auckland Harbour Bridge Act, 1950—Claim against Authority for Compensation—"Fair commercial value"—No Right to "compensation for loss of goodwill"—Matters to be determined by Commission in assessing Compensation—"Goodwill"—Auckland Harbour Bridge Act, 1950, s. 68 (1) (a), (3).*

The proper construction to be placed on s. 68 (1) (a) of the Auckland Harbour Bridge Act, 1950, is:

(a) The Compensation Assessment Commission is to determine the fair commercial value of the Devonport Steam Ferry Co., Ltd.'s, fleet of vessels, but without any allowance for goodwill or loss of profits.

(b) In making such valuation, every proper method of valuation is available to the Commission, provided it is not based on a capitalization of the profits from the operation of the vessels.

The method of replacement cost less depreciation and obsolescence, while a proper method to use, does not necessarily mean, as a starting-point, replacement cost as at December 1, 1950 (the date of the passing of the statute), with an allowance for depreciation and obsolescence. The Commission should consider also original cost, and the question of averaging costs over a period, and it should determine the period. These and all other relevant circumstances (always excluding goodwill—that is, profit-earning capacity) should be given their proper weight, so that the ultimate figure arrived at satisfies the Commission that it is a fair commercial value of the vessels.

*Hamilton Gas Co., Ltd. v. Hamilton Borough* ((1910) N.Z.P.C.C. 357), *International Railway Co. v. Niagara Parks Commission* ([1937] 3 All E.R. 181), *Royal Motor-bus Co., Ltd. v. Auckland City Council* ([1927] N.Z.L.R. 423), *Oldham, Ashton and Hyde Electric Tramways, Ltd. v. Ashton Corporation* ([1921] 1 K.B. 269), *National Telephone Co., Ltd. v. Postmaster General* ((1913) 29

T.L.R. 190), *Toronto City Corporation v. Toronto Railway Corporation* ([1925] A.C. 177), and *Montreal v. Sun Life Assurance Co. of Canada* ([1952] 2 D.L.R. 81) applied.

*Liesbosch (Dredger) (Owners) v. Edison (Steamship) (Owners)* ([1933] A.C. 449) distinguished.

The Commission should proceed to its assessment of the value of the company's fleet as above indicated.

Consideration of the meaning of the term "goodwill."

*In re An Arbitration between Hucknall-under-Huthwaite Urban District Council and South Normanton, Blackwell and Hucknall-under-Huthwaite Gas Co., Ltd.* ([1905] 69 J.F. 329), *In re An Arbitration between London County Council and London Street Tramways Co.* ([1894] 2 Q.B. 180), *Hamilton Gas Co., Ltd. v. Hamilton Borough* ([1910] N.Z.P.C.G. 357), *Royal Motor-bus Co., Ltd. v. Auckland City Council* ([1927] N.Z.L.R. 423), *Franklin Electric Supply and Trading Co., Ltd. v. Clunie* ([1926] G.L.R. 164), *Re West Canadian Hydro Electric Corporation, Ltd.* ([1950] 3 D.L.R. 321), and *International Railway Co. v. Niagara Parks Commission* ([1937] 3 All E.R. 181) referred to.

CASE STATED by the Auckland Harbour Compensation Commission, pursuant to s. 10 of the Commissions of Inquiry Act, 1908.

By the Auckland Harbour Bridge Act, 1950, provision was made for the constitution of the Auckland Harbour Bridge Authority, and for the construction, maintenance, management, and control by the Authority of a bridge across the Waitemata Harbour from Point Erin to Stokes Point. By Part VII of the Act, provision was made for the appointment of a Commission or Commissions to assess, in accordance with the provisions of that part of the Act, the amount of compensation payable to the Devonport Steam Ferry Co., Ltd., in respect of any claim submitted to the Authority by the company under ss. 66, 68, and 70 of the Act in respect of loss incurred through the operation of the bridge. A claim pursuant to such provisions was duly made, and, in order to determine the questions arising and now ripe for determination, His Excellency the Governor-General by Order in Council dated August 29, 1951, appointed Mr. S. L. Paterson, S.M., to be a Commission under the Commissions of Inquiry Act, 1908, to inquire into and report upon the following matters:

1. The fair commercial value as at the first day of December, 1950, and as in actual operation at that date of the fleet of vessels owned by the said Company. 20
2. The amount of capital expenditure incurred by the said Company between the first day of December, 1950 and the 18th day of April, 1951, (being the date of the first meeting of the Authority) in maintaining or augmenting its fleet of vessels in such manner as to ensure the continuance of an adequate harbour service.
3. The amount of any special depreciation reserve established by the said Company and existing on the first day of December, 1950, by way of provision for loss anticipated to arise in consequence of the operation of the said Bridge. 25

During the course of the hearing before the Commission, agreement was reached on Questions 2 and 3, and, in result, the evidence was directed principally to the first question. At the hearing, disputes arose between the parties as to the interpretation of Part VII of the Act and as to the relevancy of certain evidence tendered before the Commission, and, at the conclusion of the hearing, the Commission was requested by counsel for the Authority to refer such disputed points of law to the Supreme Court for decision. This the Commission agreed to do, and the inquiry was adjourned to await the decision of the Court. It was arranged that fresh evidence should be called if the decision of the Supreme Court made it necessary or desirable. 30 35

It appeared that the parties were not able to agree upon the terms of the Special Case, and, in result, the learned Commissioner himself stated the case.

The facts sufficiently appear from the judgment.

- 5 *Richmond, Q.C.*, for the Auckland Harbour Bridge Authority. Under s. 67 of the Auckland Harbour Bridge Act, 1950, no artificial method of assessment of compensation must be allowed to give an abnormal valuation. The word "operation" means "working".
- 10 In s. 68 (1) (a), the words "fair commercial value" differ from the word "value", which is used in the Public Works Act, 1928, in relation to compensation under that statute. The word "fair" excludes any technical basis which would lead to injustice to either party. The word "commercial" is of the greatest importance. As to its meaning, see
- 15 2 *Oxford English Dictionary*, Part II, 678, and *Mayor, &c., of Timaru v. South Canterbury Electric-power Board* ([1928] N.Z.L.R. 174, 176). The words "commercial value" must be read as meaning "value for commercial purposes"—i.e., purposes of profit: see, for the proper view, *Hamilton Gas Co., Ltd. v. Hamilton Borough* (1910) N.Z.P.C.C. 357). Commercial value cannot be higher than replacement value: see *Royal*
- 20 *Motor-bus Co., Ltd. v. Auckland City Council* ([1927] N.Z.L.R. 423), which shows that a market is to be assumed because of the provisions of the statute, and, consequently, "fair commercial value" is to be ascertained on the basis of an assumed market. The words "in actual operation" mean "as a working going concern". The Commission
- 25 should value the company's fleet as for profit-earning and viewed as a going concern—i.e., the object of the valuation is the fleet in operation. A traffic licence is necessary for the operation of the fleet, but the company has a *de facto* monopoly. A licence is not goodwill: *Rutter v. Daniel* (1882) 30 W.R. 724). A value must be ascertained, as of a
- 30 profit-earning machine, which will be fair and just, as if in 1950 the directors had decided to sell the fleet for what they could get for it. If the standard of replacement is taken as the basis of business-value, the result may be absurd—e.g., two gold-dredges, each costing the same amount, one on an exhausted claim and the other on a claim with many
- 35 years work ahead. Checks which would prevent abnormal value must not be excluded.

- As to contingent possibility, see *In re An Arbitration between Lucas and Chesterfield Galard Water Board* ([1909] 1 K.B. 16, 26, 28). The absence of a real market test is no obstacle to an assessment of value
- 40 to an owner or to a notional purchaser. A notional purchaser can be assumed, as in *Royal Motor-bus Co., Ltd. v. Auckland City Council* ([1927] N.Z.L.R. 423).

- The terms "residual value" and "value to the company" in s. 68 (1) (c) mean "value to the company of the fleet as a profit-
- 45 "earning machine"—i.e., "fair commercial value."

- In s. 58 (3), the word "confer" shows that at the time of an assessment the Commission must visualize the position as if the statute had not been passed, and it is inserted *ex abundanti cautela*. It does not affect the interpretation of s. 68 (1) (a).

- 50 Under s. 69, any loss of the Auckland Harbour Board is to be determined, not on the replacement value, but by taking the real value of any asset left on the Board's hands. The dominant purpose of the statute is to compensate for loss.

- As to the general principles of construction: Section 65 and the
- 55 following sections must be read so as to give the same meaning to the

word "compensation" throughout. If there is any doubt as to the meaning of the words "fair commercial value", the general purpose of the Act and its history are to be looked at. The company should not be enriched by reason of any technicality or artificiality: *Seaford Court Estates, Ltd. v. Asher* ([1949] 2 K.B. 481, 498; [1949] 2 All E.R. 155, 164), *The Iron-Master* (1859) Swab. 441; 166 E.R. 1206), *The Harmonides* ([1903] P. 1), *The Castor* ([1932] P. 142), *Liesbasch (Dredger) (Owners) v. Edison (Steamship) (Owners)* ([1933] A.C. 449, 463), and *James Patrick and Co. Pty., Ltd. v. Minister of State for The Navy* ([1944] A.L.R. 254). Replacement value is not taken as the sole test of value; there is no case where the value of a ship has been fixed on a replacement basis.

*Holmden*, in support. There is no statutory definition of the word "obsolescence", but see *Toronto City Corporation v. Toronto Railway Corporation* ([1925] A.C. 177, 184, 185), *Oxford English Dictionary*, Part I, 33, ("The process of . . . growing out of date"), and *In re A. Manoy, Ltd., and Waimea Co-operative Dairy Co., Ltd.* ([1936] G.L.R. 593). There will be no use for vehicular ferries when the bridge is opened; and, accordingly, they should be treated as obsolescent.

*Sir Wilfrid Sim, Q.C.*, for the Devonport Steam Ferry Co., Ltd. 20  
The learned Commissioner has stated this Case on a question of law. He has a discretion as to the basis of value in arriving at his award, so long as he proceeds in conformity with the statute: *In re South Australian Co. and The Crown* ([1921] S.A.L.R. 112, 122, 123, 146), *Toronto City Corporation v. Toronto Railway Corporation* ([1925] A.C. 25 177, 187), and *Manoy's case* ([1936] G.L.R. 593, 598). The assets for valuation are all of a kind that have to be constructed.

The Auckland Harbour Bridge Act, 1950, sets up a code for ascertaining the amount of compensation payable, and it is complete and exclusive: see s. 68 (1) (2). It is evidence of a bargain, resolving a 30 question between the Government and the company: s. 68 (5). Each of the specific assets should be separately valued, and the valuation cannot be of the totality of the company's undertaking or fleet. Under s. 68 (1) (b), the cost of a new ship is the basis of value.

Section 68 (1) (a) both permits and compels a valuation based upon 35 the cost of replacement as at December 1, 1950, less depreciation according to the age and condition of the vessel. Its language is synonymous with "the real value of the fleet assembled and in working order with their capacity to earn profits". The consideration of profits may increase or reduce the amount of compensation. In- 40 variably, according to the authorities, the initial approach in ascertaining value is to determine, on construction, whether the undertaking to be valued involves franchise or licence and goodwill. If it is the undertaking that is to be valued, profits and goodwill may come in, but not if they are expressly or impliedly excluded. If it is found 45 that the valuation is not of the undertaking, but is of its component parts or assets, then invariably all questions of profit and goodwill are excluded. This is a valuation of assets with goodwill (which involves profit considerations) expressly excluded by s. 68 (3). Where there is no market for an asset (as is admitted to be the situation in the present 50 case), the almost invariable rule is that the correct basis of the ascertainment of value is replacement cost less depreciation as at the relevant date. For a general illustration of the foregoing principles, see *Hamilton*



- Gas Co., Ltd. v. Hamilton Borough* ( (1910) N.Z.P.C.C. 357), *International Railway Co. v. Niagara Parks Commission* ([1937] 3 All E.R. 181, 186, 188), *Melbourne Tramway and Omnibus Co., Ltd. v. Tramway Board* ([1919] A.C. 667, 672, 675, 676), *Toronto City Corporation v. Toronto Railway Corporation* ([1925] A.C. 177, 184, 191), *In re An Arbitration between London County Council and London Street Tramways Co.* ([1894] 2 Q.B. 189, 206), *National Telephone Co., Ltd. v. Postmaster-General* ([1913] 2 K.B. 614; aff. on app., [1913] A.C. 546), and *Edinburgh Street Tramway Co. v. Lord Provost, &c., of Edinburgh* ([1894] A.C. 456).
- 10 As to shipping cases, see *James Patrick and Co. Pty., Ltd. v. Minister of State for The Navy* ([1944] A.L.R. 254, 256, 258) (the Admiralty rules are different from the terms of the Auckland Harbour Bridge Act, 1950), *In re Ships "A" and "B"* ( (1943) 3 M.C.D. 44), and *The King v. Northumberland Ferries, Ltd.* ([1945] 3 D.L.R. 145). *Liesbosch (Dredger) (Owners) v. Edison (Steamship) (Owners)* ([1933] A.C. 449, 464, 468) is of no practical use: *The Castor* ([1932] P. 142, 146) and *The Philadelphia* ([1917] P. 101). Admiralty practice seeking to define loss or damage consequent upon tort is of no real guidance in a compensation matter.
- 20 As to the language of s. 68 (1) (a): The words "fair commercial value" mean "real value". As to the words "in actual operation", see *Manoy's case* ([1936] G.L.R. 593, 598). The word "goodwill" excludes all reference to profits: *Re City of Peterborough and Peterborough Electric Light and Power Co.* ([1923] 3 D.L.R. 350, 355, 361, 362, 363). In *In re Oriental Hotel, Muir to Niall* ([1944] N.Z.L.R. 512), goodwill is treated as enhancing the value of land, and as comprehending profits of a business. Goodwill is synonymous with profits; and see *In re An Arbitration between Hucknall-under-Huthwaite Urban District Council and South Normanton, Blackwell and Hucknall-under-Huthwaite Gas Co., Ltd.* ( (1905) 69 J.P. 329, 332) and *Rutter v. Daniel* ( (1882) 30 W.R. 724). In *Franklin Electric Supply and Trading Co., Ltd. v. Clinie* ([1926] G.L.R. 164, 166), *Stringer, J.*, held that, "goodwill" being excluded, this took the licences with it and any element of value arising therefrom, and made profits or losses irrelevant.
- 35 *Kingston*, in support. As to obsolescence: The possibility of the creation of a bridge or tunnel does not create a state of obsolescence. An example is the substitution of diesel engines for coal engines. The harbour bridge is a new form of transport, which may render vehicular ferries redundant, but not obsolete. As to the company's shares, see
- 40 *Adam's Law of Death and Gift Duties in New Zealand*, 2nd Ed. 277. Shares differ in their nature from a ship, as their dominant factor is their value as an investment—i.e., as income-producers: *In re Paulin, In re Crossman* ([1935] 1 K.B. 26, 57). It is impossible to separate profits deriving from tangible assets from those deriving from intangible
- 45 assets.
- Richmond, Q.C.*, in reply. As to the construction of the statute: Its dominant purpose is to provide for loss, and, if the word "commercial" is ambiguous, this dominant purpose may control and indicate its meaning. In all the cases cited for the company, there is an express exclusion of profits. The word "commercial" is either synonymous with or includes the earning of profits: see *Mayor, &c., of Timaru v. South Canterbury Electric-power Board* ([1928] N.Z.L.R. 174). The word "as" in the phrase "as in actual operation" accentuates the view



that, if a fleet is in actual operation, it must be making or losing money. In any case, see *International Railway Co. v. Niagara Parks Commission* ([1936] 1 D.L.R. 737, 744).

The submissions for the company against any consideration of profits are based on s. 68 (3); but the submission for the Authority is that, as at the date for assessment, there was no loss of goodwill. In all the cases in which replacement cost has been allowed, it has been because the assets had a higher value. Of all the cases cited for the company, the first eight, except *In re Ships "A" and "B"* (1943) 3 M.C.D. 44 and *Hamilton Gas Co., Ltd. v. Hamilton Borough* (1910) 10 N.Z.P.C.C. 357, contain these elements: (a) compulsory purchase or quasi-purchase; (b) no buyer except a compulsory purchaser; (c) the requirement that plant must be *in situ*; (d) complete cessation of the buyer's right to carry on; and (e) express exclusion of taking any account of profits or goodwill. There is less analogy with this case than there is with the Admiralty cases: see *Royal Motor-bus Co., Ltd. v. Auckland City Council* ([1927] N.Z.L.R. 423) and *Melbourne Tramway and Omnibus Co., Ltd. v. Tramway Board* ([1919] A.C. 667, 674), where, at the moment of valuation, goodwill was excluded; but in this case goodwill at the time of valuation was not excluded. Inquiry could be made as to the amount of traffic; the accounts of the company and the results of the operations of the ferry service should be examined; and an estimate should be made of what a purchaser would consider he could make out of the ferry service.

Sir Wilfrid Sim, Q.C., adds: If the Authority's submissions as to valuation are accepted, the Commissioner may then value, as part of the assets, both the licence and the goodwill. This seems to be admitted.

*Cur. adv. vult.*

The judgment of the Court was delivered by

STANTON, J. We do not propose to do more than refer to some of the relevant facts set out in the Case Stated. The following matters, however, it seems to us, in particular require special mention:

(a) The Devonport Steam Ferry Co., Ltd. (which, for convenience, will hereinafter be referred to as the "company") has for upwards of seventy years efficiently and profitably carried on passenger and vehicular services across the Auckland Harbour, for which purpose it has acquired a fleet of ferry vessels and other assets, including a subsidiary local road transport passenger company.

(b) Two Royal Commissions, one appointed in 1929 and the other in 1946, both reported that the time would come when a ferry service would no longer adequately cope with the trans-harbour traffic, so that the provision of a harbour bridge would become imperative. The 1946 Commission specifically found that the existing service, augmented and improved as the Commission recommended, would meet the needs of traffic for the next ten or fifteen years, but that, at the expiration of that time, a harbour bridge would be necessary. It was also found that, when the bridge was in service, no scope would remain for vehicular ferries, but that passenger ferry services would remain to a limited number of points.

(c) It was recognized that, for the period between the passing of the Act and the opening of the bridge, it was necessary that an efficient

ferry service should be maintained, particularly having regard to the needs of an increasing population. It was also recognized that, if such services were to be maintained and augmented, the company would be forced into heavy capital expenditure in respect of its fleet.

- 5 (d) By virtue of the Transport Law Amendment Act, 1948, the company's ferry services became subject to Part II of the Transport Licensing Act, 1931 (now Part VI of the Transport Act, 1949), and at December 1, 1950, the company was the holder of a temporary harbour-ferry licence under that Act, and no other person had a harbour-ferry licence in respect of the Auckland Harbour.

10 (e) As at December 1, 1950, no market existed in New Zealand or elsewhere for the vessels of the company's fleet, or for vessels of that type.

- The Special Case set out the submissions made before the Commission  
15 by the company and the Authority, but at the hearing in this Court these submissions were somewhat modified, and it would, we think, be correct to say that the main submission by the Authority was that the Commission, in determining the fair commercial value as at December 1, 1950, and as in actual operation at that date, of the fleet of vessels  
20 owned by the company, should ascertain the capitalized value of such fleet as a going concern and on a profit-earning basis. In elaboration, it was submitted that, in arriving at the prospective earning-power of the fleet, it was proper for the Commission to take into consideration such evidence as might be available to establish that a probability  
25 existed before the passing of the Act that a bridge across or a tunnel under water would be constructed by a foreseeable date and would injuriously affect the earning-power of the fleet. It was conceded that, in ascertaining the value as a going concern, the Commission was also entitled to take into consideration, together with other factors, such  
30 matters as the original construction cost, and also the replacement cost of the vessels less depreciation and less a reduction for obsolescence, but only in conjunction with an inquiry as to their profit-earning capacity. It was further contended that, if it was established that a probability  
35 existed before the passing of the Act that a bridge or tunnel would be so constructed and would substantially reduce the volume of ferry-borne traffic, this was a factor relevant to determining the extent, if any, of obsolescence.

- For the company, on the other hand, it was submitted that, in determining the fair commercial value of the fleet of vessels as aforesaid,  
40 the Commission must apply the test of the cost of replacing each vessel less depreciation for the age of such vessel and less also (if the Commission thought it proper to take the matter into account) the obsolescence of any of the company's vessels.

- Both parties agreed before the Commission, and again in this Court,  
45 that the fact that the bridge was now to be built pursuant to the Act should not be taken into account as affecting values.

- The learned Commissioner informed the parties, and so indicated to the Court, that, in his opinion, a correct method of arriving at the value of the company's fleet in accordance with the statute, there being no  
50 available market for such fleet, was the replacement cost of the component vessels of the fleet as at December 1, 1950, less depreciation for age, commonly known as "straight line" depreciation, and that, subject to any ruling of this Court, that was the method he proposed to apply, though he agreed that obsolescence might be taken into account  
55 if it were established by the evidence. In elaboration, the learned

Commissioner stated that, in his opinion, the submission of the Authority was incorrect as being contrary to established authority and because it of necessity introduced considerations of goodwill, which he held were expressly excluded by s. 68 (3) of the Act.

The following questions were submitted by the Commission to this Court :

(1) What is the proper construction to be placed on s. 68 (1) (a) of the Auckland Harbour Bridge Act, 1950, in relation to the test of factors to be applied by the Commission on its assessment of the value of the Company's fleet ?

(2) Does either or both of the method of assessing value submitted by the company in para. 5 (i) above or by the Authority in para. 6 (i) above comply with the requirements of the Act ?

(3) Are there any other methods of assessing value which comply with the requirements of the Act ?

(4) Is the Commission free to choose whichever method of assessment of value it considers proper in the circumstances, or is it obliged as a matter of law to apply any one or more of such methods to the exclusion of any other of such methods ?

(5) If the test of replacement cost is applicable, should such cost be determined as at December 1, 1950, or at an earlier date ?

It is to be observed that Part VII of the Act makes provision for three separate claims for compensation. First, there is a claim by the company which is dealt with in ss. 67, 68, and 70 ; secondly, there is a claim by the Auckland Harbour Board on account of expenditure incurred by it, during the period between the date of the commencement of the Act and the date when the bridge is first opened, in the provision during that period of vehicular and passenger landing facilities necessary for the carrying on by the company of an adequate harbour-ferry service ; and, thirdly, there are claims by employees of the company in respect of loss of employment caused by the curtailment, on account of the opening of the bridge for public traffic, of the harbour-ferry service carried on by the company.

The general features of this part of the Act appear to be these : the Legislature, in granting the necessary statutory authority for the building of the bridge, took cognizance of the circumstance that the public interest required that appropriate measures should be taken to ensure that adequate facilities for the public were maintained pending the completion of the bridge, and to this end it thought it necessary to make provision for compensation in favour of those persons and their employees who were expected to maintain—and, indeed, augment—existing services. The provisions that are made in the company's favour, as s. 27 of the Act clearly shows, are by way of granting compensation in respect of loss incurred through the operation of the bridge. The primary object, it would appear, was to prevent not only a cessation but a deterioration in the service, and consequent injury to the public. To achieve this end, as was stated by their Lordships in *Melbourne Tramway and Omnibus Co., Ltd. v. Tramway Board* ([1919] A.C. 667) : " the two parties are by statute coerced, so to speak, into a settlement " (*ibid.*, 675).

Section 68 of the Act is as follows :

(1) For the purposes of assessing any such compensation the Commission shall determine—

- (a) The fair commercial value as at the date of the passing of this Act and as in actual operation at that date, of the fleet of vessels owned by the company :
- 5 (b) The amount of capital expenditure incurred by the company, with the approval of the Authority, in the period between the date of the passing of this Act and the date when the bridge first becomes open for public traffic, in maintaining or augmenting its fleet of vessels during that period in such a manner as to ensure the continuance of an adequate Harbour ferry service. All capital expenditure incurred by the company for any
- 10 of the said purposes between the passing of this Act and the date of the first meeting of the Authority shall be deemed to be incurred with the approval of the Authority :
- (c) The residual value as at the date when the bridge first becomes open for public traffic of the fleet of vessels owned by the company at that date.
- 15 When making its determination under this paragraph, the Commission may take into account both the disposal value of any of its vessels which the company proposes to sell and the value to the company of any of its vessels which it proposes to retain for the purposes of continuing a harbour ferry service :
- (d) The portion of the amounts determined pursuant to paragraphs (a) and (b)
- 20 of this subsection which the company has been able to recover by means of—
- (i) The residual value determined pursuant to paragraph (c) of this subsection ;
- 25 (ii) The amount of any special depreciation reserve established by the company and existing at the date of the passing of this Act by way of provision for loss anticipated to arise in consequence of the operation of the bridge ; and
- (iii) The fares charged to the public during the period intervening
- 30 between the passing of this Act and the date when the bridge first becomes open for public traffic.
- (2) The amount of compensation payable to the company under this Part of this Act shall be the sum of the amounts determined pursuant to paragraphs (a) and (b) of subsection one of this section, less the amount determined pursuant to
- 35 paragraph (d) of that subsection.
- (3) Nothing in this Part of this Act shall be deemed to confer upon the company any right to compensation for loss of goodwill.
- (4) The matters referred to in paragraph (a) of subsection one of this section, and any other matters referred to in this section which can at the same time be
- 40 conveniently determined shall, as soon as practicable after the commencement of this Act, be referred to the Commission.
- (5) The right of the company to receive compensation under this Part of this Act shall be conditional upon the company maintaining, at all times during the period between the passing of this Act and the date when the bridge first becomes open
- 45 for public traffic, an adequate harbour ferry service serving the same localities and traversing the same routes as are served and traversed, at the passing of this Act, by the harbour ferry service owned by the company. For the purposes of this subsection, the company shall be deemed to have maintained an adequate harbour ferry service during any period that it is the holder of a harbour ferry service licence
- 50 under the Transport Act, 1949, granted in respect of the said localities and routes.

We think the proper approach is to begin by examining the language of the section. As was said by Lord Shaw of Dunfermline, delivering the judgment of their Lordships in *Hamilton Gas Co., Ltd. v. Hamilton Corporation* ((1910) N.Z.P.C.C. 357) : " Their Lordships, however,

55 " are of opinion that each of these cases, and also the present case, " depended and depends not upon any rule or principle of law of general " application, but solely and entirely upon what is the just construction " of the language, whether of statute or agreement, regulating the measure " and nature of the claim " (*ibid.*, 359).

In our view, before considering the meaning of the words in subs. 1 (a), it is necessary to consider the effect of subs. 3. The company contended that this subsection should be read as if it had been incorporated in subs. 1 (a) so that in effect it was provided that the Commission was to determine what was the fair commercial value of the company's vessels "without any allowance for goodwill". The Authority contended that subs. 3 had nothing to do with subs. 1 (a), and that the valuation therein mentioned should be made without any reference to the provisions of subs. 3. It was said that at the present time there is no loss of goodwill, and subs. 3 was only inserted *ex abundanti cautela*, to ensure that, if and when there was a loss of goodwill, the company could not claim in respect of such loss, but must accept such compensation as was payable under the Act. Consequently, the valuation under subs. 1 (a) should be made as if the provisions of subs. 3 were not in the Act, and would, or at any rate might, be the capitalized value of the fleet of vessels as a going concern and on a profit-earning basis.

It will be seen that the measure of compensation provided by the Act—disregarding, for the present, factors which are immaterial—is the difference between the present-day fair commercial value of the company's fleet and its residual value when the bridge is completed. The only way in which goodwill can enter into the computation of that amount is in the making of the valuation of the fleet: if it is not imported into that valuation by a consideration of the fleet's profit-earning capacity, goodwill could not be claimed or obtained. It seems to us more logical to relate subs. 3 to the only factor to which it could relate than, by excluding it from application to that factor, to deprive it of all meaning or force; accordingly, we hold that the valuation to be made under subs. 1 (a) is to be made upon the basis that goodwill—that is, profit-earning capacity—is to be excluded.

Although this statute must be construed and applied according to its own particular terms, the decisions of the Courts in compensation cases are some guide as to the method to be adopted in making the valuation here prescribed. On the view of the Act that we have accepted with respect to the exclusion of goodwill, the matter is in line with a number of cases which have similar features. The term "goodwill" is first used in tramway cases in *In re An Arbitration between Hucknall-under-Huthwaite Urban District Council and South Normanton, Blackwell and Hucknall-under-Huthwaite Gas Co., Ltd.* (1905) 69 J.P. 329. In that case, franchises and statutory powers were not involved, but the Court was considering the element of earning-capacity or profit-making ability, and chose to call it goodwill. In *In re An Arbitration between London County Council and London Street Tramways Co.* ([1894] 2 Q.B. 189), Lindley, L.J., said: "Apart from the direction that no allowance is to be made in respect of past or future profits of the undertaking, there would be no difficulty. The tramway would be valued as something yielding profit; the rails and the goodwill—i.e., the profit to be expected from their use—would both be valued, and the value thus ascertained would be the value of the tramway. But then no allowance is to be made for profit, and the problem is thus reduced to the question, What is the value of the tramway to a purchaser entitled to use it, but who is not to be charged anything in the shape of an allowance of past or future profit of the undertaking? The arbitrator has answered this question by saying that the value is what it would cost the purchaser to lay down the tramway. After much

"consideration I have come to the conclusion that he is right" (*ibid.*, 206).

- The word "goodwill" has since then been commonly used in judgments, statutes, and contracts to indicate profit-earning capacity: see *Hamilton Gas Co., Ltd. v. Hamilton Borough* ((1910) N.Z.P.C.C. 357), *Royal Motor-bus Co., Ltd. v. Auckland City Council* ([1927] N.Z.L.R. 423), and *Franklin Electric Supply and Trading Co., Ltd. v. Clunie* [1926] G.L.R. 164). In all the cases where goodwill or its equivalent has been excluded as an element in estimating value, the Courts have uniformly excluded any question of profits, for the purpose either of increasing the valuation, as in the *London Street Tramways Co. case* ([1894] 2 Q.B. 189), or of reducing it, as in the *Franklin Electric Supply and Trading Co. case* ([1926] G.L.R. 164).

- The valuation here required is a valuation not of a business or undertaking, as in the *Hamilton Gas Co.'s case* ((1910) N.Z.P.C.C. 357) or in the tramway cases, but only of a number of vessels, and it has not been usual, when such a valuation has had to be made, to consider profit-earning capacity. As was said by Wilson, J., in *Re West Canadian Hydro Electric Corporation, Ltd.* ([1950] 3 D.L.R. 321): "To sum up 20 "the English and Canadian cases, this might be said: 1. That in every "case where only physical structures without franchises, or statutory "powers, or other things necessary to earning capacity were taken, "reproduction cost was the test of value, and consideration of earnings "was excluded. 2. That in the cases where a whole undertaking was 25 "taken, earnings were considered and an overall value set, except where "the statute fixed a method of measuring value which excluded consideration of earning capacity" (*ibid.*, 357). The learned Judge's words "were taken" may, we think, for our present purpose be appropriately replaced by the words "were to be valued".
- 30 However, if the vessels be treated as an undertaking, then, in our view, if the meaning of the Act is that the valuation of the vessels is to be made without any allowance for goodwill, *International Railway Co. v. Niagara Parks Commission* ([1937] 3 All E.R. 181), a decision of the Judicial Committee of the Privy Council, is a strong authority 35 against adopting profit-earning capacity as the basis of that valuation. In that case, the railway company had been granted by agreement, confirmed by statute, the exclusive right for a period of years to construct and operate an electric railway which it was hoped would be used extensively by tourists wishing to view Niagara Falls. In point of 40 fact, however, the railway was not a success, because of the advent of the motor-car. The terms of the agreement provided that at the end of the period the company was to be duly compensated "for their rail-ways, equipment, machinery and other works . . . but not in "respect of any franchises for holding or operating the same". The 45 arbitrators by a majority reached the conclusion that the railway had become practically valueless as a going concern, and that, in result, the compensation should substantially be the scrap or break-up value of the undertaking. The Court of Appeal of Ontario was unanimously of opinion that evidence of losses in the operation of the railway was 50 admissible to determine value. The Privy Council reached the opposite conclusion, for the reason that, it held, it was fundamental that it was a working railway, complete with equipment, machinery, and works, which the company was bound to hand over, and for which it was to be duly compensated; and, in result, the proper basis of the compensation 55 was the cost of reconstruction less depreciation. Their Lordships

were of opinion that the proper construction of the statutory agreement could not depend on the financial results which had in fact followed. If the Niagara Parks Commission was right, then it must necessarily have followed that, if the company had proved a huge success, then the company would have been entitled to the commercial value of its undertaking, and such a result would have been contrary to the language of the agreement. Lord Macmillan, in delivering the judgment of the Board, said: "It is a familiar feature, common to all cases in which a franchise for a public utility is granted to private undertakers for a limited period, coupled with an obligation to transfer the undertaking to a public authority at the conclusion of the period, that the undertakers must look to reap the reward of their enterprise in the profit which they may make during the currency of their franchise, and on its expiry shall receive only the value of the structure which they have created, without any compensation either for the profits or the losses which they may have made or sustained while in the enjoyment of their franchise. This is plainly just, for, with the termination of the franchise, the power to make profits or the liability to incur losses simultaneously terminates. The promoters have had their chance to make what they can out of their undertaking in the knowledge that it was of limited duration and that they must part with it at a fixed date. To compensate them on the basis of the profits which they have made and are surrendering would be to assume that they had a right to go on making profits although *ex hypothesi* the franchise which gave them that right had come to an end. It is these considerations which, in their Lordships' view, render it erroneous in principle to have regard to profits earned or losses sustained when what is in question, as here, is the compensation to be paid to a private undertaker at the expiry of its limited franchise for the physical structure which it has created and which has then to be transferred to a public authority. In the present case, the agreement expressly stipulates that the company is not to be compensated 'in respect of any franchise for holding or operating' its railway. That is to say, it is to receive nothing in respect of the loss of the right to make profits which the franchise conferred upon it. The effect of these words is equivalent to the exclusion of any allowance for past or future profits" (*ibid.*, 189, 190).

The circumstances were no doubt different, and the words "commercial value" were not used, and to say that the commercial value of the property is to be ascertained without taking account of its capacity to earn commercial profits seems to be a contradiction in terms. However, in numerous cases such a contradiction in similar circumstances has been accepted, and we think it must be accepted here.

Assuming, then, that the question of profits is excluded, the next fact to be considered is that there was at the relevant date no market in New Zealand or elsewhere for the vessels of the company's fleet. It is not stated whether this absence of market was due to the intended erection of the bridge or to other causes. If it were the former, the position would be the same as in *Royal Motor-bus Co., Ltd. v. Auckland City Council* ([1927] N.Z.L.R. 423), and, in accordance therewith, it would be necessary to assume a market. If the bridge had not caused or contributed to the absence of market, it would, we think, still be necessary to assume an available market, because otherwise the vessels would have to be valued at their break-up value, and this could not be



said to represent their "fair commercial value", and that, it is thought, cannot have been the intention of the Legislature.

Having rejected the two methods of profits basis and scrap value, what is left as a means of ascertaining the fair commercial value of these  
5 vessels? In the *Royal Motor-bus Co.* case, in analogous circumstances, *Sir Charles Skerrett, C.J.*, delivering the judgment of the Court (consisting of himself and of *Herdman and Reed, J.J.*), said that in most cases the value of twenty-eight motor-buses would be the aggregate value of  
10 each of them, and, after discussing a claim for fleet value, concluded thus: "We see no reason why, if the Compensation Court thinks proper, it should not ascertain the fair commercial value of the assets *in globo* "on the basis of an available market—carefully excluding goodwill as  
"an element in value" (*ibid.*, 428). The judgment does not say by what method this value was to be ascertained, but it is difficult to see  
15 what method could have been adopted in that case other than the method known as reproduction cost less allowances for depreciation and obsolescence. In *Oldham, Ashton and Hyde Electric Tramways, Ltd. v. Ashton Corporation* ([1921] 1 K.B. 269), *Rowlatt, J.*, said it was the only way: "Criticisms upon it readily occur to one, but it is established"  
20 (*ibid.*, 277). Such criticisms may perhaps be said to be even more pertinent when one has—as here—to consider not "value" merely, but "fair commercial value", and we think it proper to say that merely to take reproduction cost as at December 1, 1950, and then to deduct allowances for depreciation and obsolescence could hardly be expected  
25 to result in ascertaining the fair commercial value of the vessels. While, therefore, realizing that these are matters for the Commission to determine in the light of the facts as proved before it, we desire to say that it is not by any means incumbent on the Commission to confine itself to costs as on December 1, 1950, nor has it been the habit of arbitrators  
30 always to do so. In *National Telephone Co., Ltd. v. Postmaster-General* (1913) 29 T.L.R. 190, it is said that the arbitrators in valuing materials took the average price paid for a period of twelve years, and for labour took the average cost for a period of six years. In *Toronto City Corporation v. Toronto Railway Corporation* ([1925] A.C. 177), *Viscount Cave*,  
35 in delivering the judgment of the Judicial Committee, while approving the decision of the arbitrators that they should have regard to prices as at the time of the arbitration, said that the arbitrators had by no means adopted reproduction cost less depreciation as the only and sufficient test of value, but had had regard in some cases to original  
40 cost of construction, reproduction cost, physical deterioration, degrees of obsolescence, and alleged defects and advantages from the operating standpoint (*ibid.*, 191).

There is a very illuminating and instructive judgment on methods of ascertaining values in *Montreal v. Sun Life Assurance Co. of Canada*  
45 ([1952] 2 D.L.R. 81), a decision of the Judicial Committee of the Privy Council. That case concerned the value at which a somewhat unusual building was to be assessed for rating purposes. While the circumstances are not wholly parallel, the examination of possible factors and their relative importance in determining ultimate value is helpful in solving  
50 the present problem. We refer to the following passage as exhibiting a realistic appreciation of the considerations to be kept in view: "The 'ultimate object being to find the amount which a willing buyer and 'seller would agree upon it by no means follows that the owner, even if  
"regarded as a potential buyer, would pay the price originally expended  
55 "or, to take another line of approach, that if he had to re-erect the



"building at the time of the assessment, he would erect one of the same form or incur the same expenditure. All these matters and among them any change of circumstances must be taken into consideration" (*ibid.*, 96).

Mr. Richmond, for the Authority, invited the Court to have regard to some of the Admiralty cases where ships have been lost as the result of negligence on the part of another: see *Liesbosch (Dredger) (Owners) v. Edison (Steamship) (Owners)* ([1933] A.C. 449). In that case, Lord Wright spoke of the figure of damages representing "the capitalized value of the vessel as a "profit-earning machine" (*ibid.*, 464). We have carefully studied these cases, but do not find them really helpful. The guiding principle in actions in tort is *restitutio in integrum*, and it is difficult to distinguish between the value of the vessel and the loss sustained by the owner having regard to the ships' pending engagements.

It remains to mention two matters which were dealt with at the hearing and in respect of which no specific questions were asked. In para. 10 of the Special Case, the learned Commissioner—impliedly, at all events—invites the Court to express an opinion on the question of obsolescence. It was argued by the Authority that, in considering obsolescence, the Commission should regard the fleet of vessels as obsolete because it is said that before the passing of the Act there was a probability that a bridge or tunnel would be built in the foreseeable future and would render useless the major part of the fleet. We think the answer is that the valuation should be made on the situation as it existed immediately before the passing of the Act. When the bridge is in operation, it is true that the major part of the fleet may be redundant, but that, in our view, is a very different matter. In our opinion, obsolescence as such arises in the present case only if it be established on the evidence that particular vessels in the fleet are, by reason of age and other considerations, less efficient than the more modern vessels: see *Toronto City Corporation v. Toronto Railway Corporation* ([1925] A.C. 177, 184, 185). In any event, the whole matter seems to us to be in the region of speculation, and we cannot think that it would be right to dispose of the company's claim in this way. If, indeed, there was anything in the point, surely it is reasonable to suppose that the argument would have been advanced in *International Railway Co. v. Niagara Parks Commission* ([1937] 3 All E.R. 181), which peculiarly lent itself to this argument.

Finally, reference is made in para. 7 of the Special Case to a contention that the "contingent" possibility of the construction of a bridge across Auckland Harbour which existed before the passing of the Act was a factor to be considered as affecting value. In our opinion, this possibility (which at the hearing was referred to as a probability) should be ignored. To begin with, as has already been said, the matter is entirely speculative, and, in any event, the provisions of the Act itself are, in our opinion, against the submission. Section 68 (1) (d) requires the company to bring in by way of deduction any reserve fund established by it "by way of provision for loss anticipated to arise in consequence of the operation of the bridge". If, then, a deduction was required to be made to take care of this contingency, the company would, or might, be twice penalized. It appears to us that this argument might apply both ways. The Authority submits that the prospect of an alternative method of crossing the harbour should be taken into account in arriving at the commercial value of the fleet. It could, we think, be argued

with equal force that, if the company declined to continue its operations, then there would indeed be an *impasse*, and this might mean that the commercial value of the fleet was higher, and not lower. There is, we think, much force in the observations of their Lordships in *Melbourne*

- 5 *Tramway and Omnibus Co., Ltd. v. Tramway Board* ([1919] A.C. 667), where Lord Dunedin, delivering the judgment of their Lordships, said: "On the one hand was the extreme position of exacting a fancy price  
10 "for the plant, because that plant was the only plant available for  
"many months. On the other was the valuation of the plant at a  
"break-up value, which would mean what it would have fetched if bought  
"to be removed to some other place where there was a cable system.  
"Between these extremes the arbitrator was to fix such compensation  
"as should effect 'an equitable settlement.' It seems to their Lord-  
"ships that within reason he was made master of the situation. As a  
15 "matter of fact, he has adopted the method of valuation which was  
"adopted in the cases of the Edinburgh Corporation and the London  
"County Council, where the words used were: 'The then value of the  
"tramway excluding profits of the undertaking.' Their Lordships  
"think that this method was clearly within the arbitrator's powers.  
20 "In so saying they recognize that this is a special case arising on the  
"provisions of a statute specially expressed, and they are not in the  
"slightest degree criticizing or qualifying the series of decisions of which  
"In *re Lucas and Chesterfield Gas and Water Board* ([1909] 1 K.B. 16);  
"Cedars Rapids Co. v. Lacoste ([1914] A.C. 569); and *Ruddy v. Toronto*  
25 "*Eastern Ry. Co.* (decided on January 23, 1917, by this Board) ([1917]  
"W.N. 34) may be taken as examples" (*ibid.*, 675, 676).

We are of opinion, then, that the possibility or probability of a bridge or tunnel being built in the foreseeable future should not be regarded as a factor in determining the fair commercial value of the fleet.

- 30 We think the questions asked should be answered as follows:

(1) The proper construction to be placed on s. 68 (1) (a) of the Auckland Harbour Bridge Act, 1950, is:

- (a) The Commission is to determine the fair commercial value of the  
35 company's fleet of vessels, but without any allowance for  
goodwill or loss of profits.

(b) In making such valuation, every proper method of valuation is available to the Commission, provided it is not based on a capitalization of the profits from the operation of the vessels.

- (2) Neither of the methods of assessing value submitted by the com-  
40 pany or the Authority completely complies with the requirements of the Act. The method of replacement cost less depreciation and obsolescence, while a proper method to use, does not necessarily mean as a starting-point replacement cost as at December 1, 1950, with an allowance for depreciation and obsolescence. The Commission should consider also  
45 original cost, and the question of averaging costs over a period, and it should determine the period. These and all other relevant circumstances (always excluding goodwill) should be given their proper weight, so that the ultimate figure arrived at satisfies the Commission that it is a fair commercial value of the vessels.

- 50 (3), (4), and (5) The Commission should proceed as already indicated in the answers given to Questions (1) and (2).

The question of costs will be for the Commission to determine.

*Questions answered accordingly.*

Solicitors for the Auckland Harbour Bridge Authority: *Holmden and Horrocks* (Auckland).

Solicitors for the Devonport Steam Ferry Co., Ltd.: *Lisle Alderton and Kingston* (Auckland).

### RAGLAN COUNTY *v.* DUVALL.

SUPREME COURT. Hamilton. 1951. November 1, 2. 1952. February 8.  
FINLAY, J.

*Licensing—Licence—Ownership—Land on which Licensed Premises erected by Lessee in Terms of Lease vested in Crown—Licence issued from Time to Time to Lessee or Lessee's Nominee—Crown the Owner of Licence on Expiry of Lease—Goodwill of Licence vesting in Crown on Reversion of Premises—Licensing Act, 1908, ss. 124-129, 254-256.*

The Whaingaroa Domain was gazetted as a Recreation and Thermal Reserve on June 1, 1886, and thus became a public domain subject to the Public Domains Act, 1881. The Crown leased the domain, or the major part of it, to one W. for twenty-one years from April 30, 1887.

As a term of the lease, W. accepted the obligation to erect "an accommodation house upon the said land sufficient to accommodate ten persons at least within twelve months from the commencement of the said term". He also undertook within eighteen months from the commencement of the term "to furnish proper and sufficient paddock accommodation for the horses of visitors, guests and travellers, such paddocks to be in immediate proximity to the said house". The lease contained nothing to indicate whether a licence was to be procured for the accommodation house, much less by whom or in whose interests any licence was to be secured.

The lessee built an accommodation house, which was called (and has continued to be called) "the Waingaro Hot Springs Hotel". At some date, believed to be in 1890, an accommodation licence in respect of the house was issued to the lessee by the local licensing authority, and it was renewed from time to time.

The first lease to W. having expired by effluxion of time, effect was given to the provisions of the lease in that the improvements on the land were valued in 1908, and a lease for a further term of twenty-one years was put up for auction, at which the then lessee became the purchaser. A new lease, dated September 26, 1908, was executed at the request of the Whaingaroa Domain Board between His Majesty the King and the lessee for a term of twenty-one years from May 1, 1908. The terms of this lease were substantially in accordance with the terms of the earlier lease. Before the expiry of that lease, the improvements on the land were valued in terms of the provisions of the lease, and a fresh lease for twenty-one years was, in the year 1929, put up for sale by auction. At that date D., who had in the meantime become the lessee—presumably by assignment—became the purchaser of the lease; and a new lease, dated July 18, 1929, was entered into between His Majesty the King and the defendant for a term of twenty-one years from May 1, 1929. This lease was validated by s. 4 of the Reserves and Other Lands Disposal Act, 1929.

The lease to W., which took effect from April 30, 1887, contained no term specifically applicable to the premises as licensed premises. In the lease of

September 26, 1908, there was a covenant by the lessees that they would comply with "the requirements of the Licensing Laws . . . so as to prevent the licence . . . being endorsed for or liable to forfeiture by reason of any breach or misconduct by the Licensee for the time being of the said accommodation house." That lease also provided that, if the Licensing Committee required capital expenditure on the premises that the lessee considered beyond the requirements of the district, then any forfeiture of the licence as a result of the failure of the lessee to comply with the Committee's requirements should not be a ground for forfeiture of the lease. The lease of July 18, 1929, contained a covenant and a provision in the same terms. Otherwise, it contained no term specifically applicable to the premises as licensed premises or to the lessee as a person holding a licence under the Licensing Act, 1908.

D. had been a lessee in occupation of the W. hotel under the lease granted to her by the Crown in July, 1929. This was for a term of twenty-one years from May 1, 1929, which expired on April 30, 1950. Since the expiry of the lease, D. remained in possession as a tenant of the Crown under a tenancy at will determinable by one month's notice. She had paid, and was paying, a ground rent of 10s. per week. The licence had never been in her name. From May 11, 1927, onwards, it was in the name of numerous men in succession. It was now in the name of one Hancock. It was assumed, however, throughout the argument that, whoever was the licensee during the tenancy of the premises by D., he held as her representative.

The Crown was the owner of the freehold of the premises; the plaintiff was the Domain Board immediately responsible for the administration of the Domain; and D. was the weekly tenant of the premises following the expiration of the lease. D. was also, through her representative, the person to whom the current licence in respect of the premises was granted.

On originating summons for determination of the question whether, upon the true interpretation of the Licensing Act, 1908, and its amendments, and of the memorandum of lease dated July 18, 1929, upon determination of defendant's leasehold interest, His Majesty the King as owner of the premises known as the Waingaro Hot Springs Hotel, or the defendant as lessee of those premises, was entitled to the accommodation licence, issued under the Licensing Act, 1908, for the premises and the goodwill pertaining thereto.

*Held.* 1. That, in view of the definition of "licensed premises" in s. 2 of the Licensing Act, 1908, and of s. 43 of the Public Reserves, Domains, and National Parks Act, 1928 (as amended by s. 29 of the Statutes Amendment Act, 1950), the Crown was the owner of the Waingaro Hot Springs Hotel for the purposes of the Licensing Act, 1908.

*Anthones v. Anderson* ((1887) 14 V.L.R. 127, 142) and *Kelly v. Montague* ((1892) 29 L.R. Ir. 429) referred to.

2. That, once the right of occupancy by the defendant was terminated, she was not in any way entitled to the accommodation licence; but, until then, she could sell it and with it the goodwill attached to it; when, however, her right of occupancy had gone, her interest in the licence ceased, and the right to acquire a new licence for its nominee belonged to the Crown.

*Metropolitan Theatres, Ltd. v. Harris* ((1935) 35 N.S.W.S.R. 228) and *Ex Parte Berry: Re Kessell* ((1936) 36 N.S.W.S.R. 485) distinguished.

*Sensible.* The goodwill attaching to the licence (and, by virtue of the licence, to the licensed premises) vested in the Crown when the premises reverted to it and it got a licence in respect of them.

5 ORIGINATING SUMMONS in which the plaintiff asked for an order declaring whether, upon the true interpretation of the Licensing Act, 1908, and its amendments and of a certain memorandum of lease dated July 18, 1929, upon determination of defendant's leasehold interest His Majesty the King as owner of the premises known as the Waingaro Hot Springs Hotel, or the defendant as lessee of those premises, is entitled to the accommodation licence and the goodwill pertaining thereto issued under the Licensing Act, 1908, for the premises.

The facts sufficiently appear from the judgment.

*Tompkins*, for the plaintiff.

*N. I. Smith*, for the defendant.

*Irvine*, for the Attorney-General.

*Cur. adv. vult.*

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FINLAY, J. Reflection has confirmed my initial opinion that the question asked in this originating summons is inaptly phrased and cannot be answered otherwise than discursively. The phrasing adopted is the result of the inability of the parties, and primarily the inability of the Crown and the plaintiff, to agree upon any other terms. The argument has, however, disclosed the precise nature of the question in dispute, and I propose to answer it in the only way in which I conceive it can be answered, that is, by determining and declaring what, in the circumstances, the respective rights of the parties interested are in respect of the licence and goodwill.

15

The factual basis is, in its essence, simple, but some of the historical facts are unknown and unascertainable, whilst as to others there is some uncertainty. The essential features are that the defendant has been a lessee in occupation of the Waingaro Hot Springs Hotel at Waingaro under a lease granted to her by the Crown on July 18, 1929. The lease was expressed to be for a term of twenty-one years from May 1, 1929, so that it expired on April 30, 1950. No question of the validity of this lease arises for it was validated by s. 4 of the Reserves and Other Lands Disposal Act, 1929.

20

Since the expiry of the lease, the defendant has remained in occupation as a tenant of the Crown under a tenancy at will determinable by one calendar month's notice. She has been and is paying, as defined in the only affidavit filed, "a temporary ground rental of ten shillings per week".

25

Broadly speaking, it is in respect of these circumstances that the question is asked as to whether the defendant or the Crown is entitled to the licence and to what is termed "the goodwill" pertaining to the licence.

30

As, however, the history of the premises and of the licence—which is an accommodation licence—was made the subject of frequent reference by counsel for the Crown, some account of that history must be given. The hotel premises are erected upon a defined area of what is known as the Whaingaroa Domain. This domain was gazetted as a Recreation and Thermal Springs Reserve on June 1, 1886. It thus became a public domain subject to the Public Domains Act, 1881. As the result of the activities of the then local authority having jurisdiction in the area, the Crown leased the domain, or the major part of it, to one Samuel Litherland Wilson for a term of twenty-one years from April 30, 1887.

40

As a term of this lease the lessee under it accepted the obligation to erect "an accommodation house upon the said land sufficient to accommodate 45 "date 10 persons at least within 12 months from the commencement "of the said term". He also undertook within eighteen months from the commencement of the term "to furnish proper and sufficient paddock "accommodation for the horses of visitors, guests and travellers, such "paddocks to be in immediate proximity to the said house".

50

The lease contains nothing to indicate whether a licence was to be procured for the accommodation house, much less by whom or in whose interests any licence was to be secured.

Mr. Wilson performed his obligations under the lease and built an accommodation house. Upon its erection the house was called, and it has continued to be called, "the Waingaro Hot Springs Hotel". At some date which is not now ascertainable, an accommodation licence in respect of the house was issued to Mr. Wilson by the licensing authority of what was then known as the Waipa Licensing District. That district, which has long since ceased to exist, covered the area from Papakura, near Auckland, in the north, to Kihikihiki, near Te Awamutu and the confines of the King Country, in the south.

It is not now possible to ascertain when the licence was first granted, but it is believed that it was granted in 1890. All that is known with certainty is that the earliest available record, a register of the Waipa Licensing District now in the custody of the Registrar of the Magistrates' Court at Hamilton, shows that an accommodation licence for the Waingaro Hot Springs Hotel was issued to Samuel Wilson on June 5, 1894, June 4, 1895, and on June 2, 1896.

The first lease to Mr. Wilson having expired by effluxion of time, the provisions of the lease were given effect in that the improvements on the land were valued in the year 1908 and a lease for a further term of twenty-one years was put up for auction. At that auction, the then lessee, Sarah Ann Wilson, became the purchaser and a new lease, dated September 26, 1908, was executed at the request of the Whaingaroa Domain Board between His Majesty the King and Mrs. Wilson for a term of twenty-one years from May 1, 1908. The terms of this latter lease were substantially in accordance with the terms of the earlier lease to Mr. Wilson.

Before the expiry of the lease of September 26, 1908, the improvements on the land were again valued in terms of the provisions of the lease and a fresh lease for twenty-one years was, in the year 1929, put up for sale by auction. At that date, the defendant, who had in the meantime become the lessee—presumably by assignment—became the purchaser of the lease and a new lease, dated July 18, 1929, was entered into between His Majesty the King and the defendant for a term of twenty-one years from May 1, 1929. It is this latter lease which was validated by the legislation previously mentioned.

The lease to Samuel Litherland Wilson which took effect from April 30, 1887, contained no term specifically applicable to the premises as licensed premises: the lease of September 26, 1908, did in that there was a covenant in it by the lessees under it that they would comply with "the requirements of the Licensing Laws . . . so as to prevent the licence . . . being endorsed for or liable to forfeiture by reason of any breach or misconduct by the Licensee for the time being of the said accommodation house". That lease also contained provision that, if the Licensing Committee required capital expenditure on the premises that the lessees considered beyond the requirements of the district, then any forfeiture of the licence as a result of the failure of the lessees to comply with the Committee's requirements should not be a ground for forfeiture of the lease. The lease of July 18, 1929, contained a covenant and a provision in the same terms. Otherwise, it contained no term specifically applicable to the premises as licensed premises or to the lessee as a person holding a licence under the Licensing Act, 1908.

Since she became lessee under the lease last mentioned, the defendant has remained the lessee continuously. The licence has never been in her name. From May 11, 1927, to the present time, the licence has been in the name of numerous men in succession. It is now in the name of one

A. E. Hancock. It was assumed, however, throughout the argument that whoever the licensee was during the tenancy of the premises by the defendant, he held as her representative.

This recital does not disclose the relative positions of the Crown and of the plaintiff Corporation. Upon the land being constituted a domain subject to the Public Domains Act, 1881, the Crown acquired the powers and authorities conferred upon the Governor by s. 5 of that Act. The Whaingaroa Highways Board was appointed the Domain Board on June 1, 1886, and remained such until March 30, 1897. Apparently, its appointment as Domain Board was made pursuant to s. 12 of the Public Domains Act, 1881. The Raglan County Council was appointed to act as the Whaingaroa Domain Board as from March 30, 1897, and has acted as such from that time up to the present.

The Domain Board necessarily has an interest in the administration of the Domain in its care, and particularly so because, by s. 7 of the Act of 1881, it was required, as it is still required, to apply all moneys received by it "under or by virtue of the Act or in any other manner howsoever" in respect of the domain lands in managing administering and improving "the lands in respect of which the money was received and generally" towards carrying into execution the purposes and objects of this Act. Later statutory enactments have not, materially at any rate, altered the character of the Board as established under the Act of 1881, nor altered its duties, rights, functions and authority.

The interest of the plaintiff in the Domain cannot, in consequence, be denied. It is this interest which has given rise to the conflict between the plaintiff and the defendant and, what is more material, to the conflict between the plaintiff and the Crown.

The plaintiff's contention is that, broadly speaking, the licence is inalienably associated with the hotel premises and that, in virtue of the licence, a remunerative business is associated with the premises so that a lease of the premises, as licensed premises, could be sold by auction to advantage.

The defendant claims what, for the purposes of the moment, might be called an unqualified proprietary interest in the licence. The Crown supports her claim. It actively disclaims any interest in or rights in respect of the licence. It assumed at the hearing the burden of proving that absence of interest and of right. It was said at the Bar that, consonant with its contention, the Crown is proposing to sell the hotel premises to the defendant for a sum of £150 which, it was said, represents the unimproved value of the land. Just why it should propose to depart in this way from the terms of the lease and from the values agreed upon I could not gather at the hearing. The lease provides for what had to be done upon the expiry of the lease. The position is governed by cls. 6 to 11 which read as follows:—

(6) WITHIN the period of SIX calendar months before the expiration of the said term (if such term shall not have been previously determined by forfeiture re-entry or otherwise) two separate Valuations shall be made in manner hereafter mentioned on evaluation of the then gross capital value of the fee simple of the land included in this lease with all improvements and the other a valuation of all substantial improvements of a permanent character made or acquired by the Lessee and then in existence on the said land and particularising the then value of all hotel buildings and bath erected since the FIRST day of MAY one thousand nine hundred and twenty-nine (hereinafter called "future buildings and baths").

(7) THE valuations shall be made by two persons one to be appointed by the Whaingaroa Domain Board and one by the Lessee and the provisions with regard



to the appointment of such Valuers and of any and every matter incidental thereto shall accord with the provisions and requirements of "The Arbitration Act 1908" or any statutory amendment thereof or substitution therefore in force at the time when such Valuations shall be made as though the questions of such Valuations had been submitted to arbitration and these presents were a reference of such question to arbitration by two Arbitrators one to be appointed by the Whaingaroa Domain Board and one by the Lessee PROVIDED ALWAYS that in case of dispute between the Arbitrators and the matter having to be decided by an Umpire appointed in compliance with the provisions of the said Act such Umpire shall in every case be bound to make a Valuation not exceeding the higher nor less than the lower of the valuations made by the other Valuers respectively PROVIDED HOWEVER that if the Valuations of improvements (exclusive of future buildings and baths) shall exceed Three Thousand Pounds then the sum of Three thousand pounds shall for the purpose of these presents be taken to be the then value of such improvements and if the then value of future buildings and baths shall exceed Two thousand Pounds then the sum of Two thousand pounds shall for the purpose of these presents be taken to be the value of future buildings and baths.

(8) THE Lessor may if he thinks fit pay to the Lessee the amount of the valuation of the buildings and improvements acquired by or belonging to her on said land as settled under the provisions of Clause 7 hereof in which case all such improvements shall upon such payment become the exclusive and absolute property of the Lessor upon the expiration of the term hereby granted.

(9) If the Lessor shall not before the expiration of the term hereby granted pay to the Lessee the amount of such Valuation of buildings and improvements as settled according to the provisions of Clause 7 hereof then in such case a new lease of the land in terms of Clause 11 hereof shall before the expiration of the term hereby granted be put up for sale by Public Auction by the Lessor.

(10) THE upset annual rental payable under such new lease shall be a sum equal to FIVE PER CENT. of the gross value as assessed by the Valuers after deducting therefrom the Valuation of improvements made or acquired by the Lessee settled according to the provisions of Clause 7 hereof and the term of such new lease shall be a period of TWENTY-ONE YEARS from the expiration of this lease and the provisions powers covenants and conditions to be contained and implied in such new lease shall except as to the amount of the annual rental be the same as in the case of the present lease.

(11) If any person other than the outgoing Lessee is declared the purchaser of such new lease such person shall forthwith pay over to the Whaingaroa Domain Board the amount of the value of the substantial improvements of a permanent character as settled according to the provisions of Clause 7 hereof for the benefit of the Lessee.

In terms of the lease, a valuation was made on December 2, 1949, by valuers for the Crown and the defendant respectively, and that valuation, as agreed upon by the valuers, shows the capital value of the property at £4,699, of which £2,894 is represented by the value of improvements assessable to the tenant. The valuation assesses to the Crown an interest of £505 in the value of improvements. Improvements to that value were, it was said, effected by the Crown. The valuation assesses to the Crown the sum of £1,300, being the unimproved value of the land inclusive of the value of the hot springs. Those figures are supported by terms arranged between the Raglan County Council and the defendant when steps were being taken to establish the premises as a trust hotel under the Whaingaroa Domain Disposal Act, 1949.

In August, 1949, the defendant offered to surrender the lease on payment of the compensation to which, in terms of cl. 7 of the lease, she was entitled; that is, to the values to which I have already referred, together with a sum of £1,000, the loss of profits which might have been earned between the date of surrender and the date of expiry of the lease. The parties agreed to these terms subject to the reduction of the sum of £1,000 for loss of profit by £100 for each complete month after October 1 during which the defendant might remain in possession of the premises. The trust proposal was not proceeded with and the arrangement became abortive in consequence.



The intention of the Crown as to the price at which it is prepared to sell is not germane to the question I have to answer, but it does make clear the effect and consequences of the Crown's contentions and is, in any event, necessary for completeness.

It is in the light of what is relevant in the sum of the circumstances already recited that the question asked by the summons must be considered.

The cardinal features are that the Crown is the owner of the freehold of the premises; the plaintiff is the Domain Board immediately responsible for the administration of the domain; whilst the defendant is the weekly tenant of the premises following upon the expiration by effluxion of time of the lease to which particular reference has already been made. The defendant is also, through her representative, the person to whom the current licence in respect of the premises was granted.

There is one point made by Mr. *Irvine* on behalf of the Crown to which reference should at once be made. He contended that the Crown does not own licensed premises. It was this contention which made it difficult for the parties to agree upon a more apposite question as the subject of the proceedings. In support of his contention, Mr. *Irvine* referred to the definition of licensed premises in the Act where such premises are defined as meaning "premises in respect of which a licence under the "Act has been granted and is in force". His contention was that the whole emphasis of this definition is on the buildings in that a licence can be granted only in respect of buildings. On this hypothesis, he then turned to the definition of "owner" and contended that, in view of the terms of the lease, the defendant was the owner of the buildings. In the result, he claimed that under the lease the defendant paid and, under the present arrangement, was currently paying rent to the Crown in respect of bare land only.

I thought at the time that this argument was not tenable, and further consideration has not induced me to change my view. To begin with, the definition of "licensed premises", by its reference to "premises", associates with itself the definition of "premises", and that word is widely defined as including "house or place" and as extending, amongst other things, to "any other place whatsoever of, belonging to or in any "manner appertaining to such house or place." For this and other reasons, it seems to me impossible to maintain that the land upon which the buildings stand is not an integral part of the licensed premises.

Nor can it, I think, be contended that the Crown is not the owner of such premises. The rent reserved by the lease was expressed to be payable to the Crown and the rent now being paid is being paid to the Crown. It was the Crown which at all times arranged and agreed to the rate of payment, and it comes directly within the definition of "owner" as "the person for the time being entitled to receive the rent of the "premises".

If it be contended, as in fact it was not, that the rental is properly receivable by the Domain Board and that, therefore, the Domain Board is the owner of the licensed premises, the argument seems to me equally untenable for, under s. 5 of the Public Domains Act, 1881, only the Governor on behalf of the Crown could grant a lease, whilst under s. 12 no delegation could extend to any power coming within the scope of s. 5. In any event, the powers that could be delegated were merely the subject of delegation, subject to alteration or revocation at any time, so that the powers of the Crown remained dominant.

A similar condition pertains today for, under s. 43 of the Public Reserves, Domains and National Parks Act, 1928, as amended by s. 29 of the Act of 1950, only the Governor-General or the Minister may lease any land comprised in a public domain whilst, by s. 52, the particular powers of domain boards are specified, and these nowhere extend to a power to lease for an extended term.

For these reasons—there may well be others which I need not consider—I hold that the Crown is the owner of the licensed premises in terms of the Licensing Act, 1908.

Mr. *Smith*, for the defendant, adopted generally the contentions of the Crown but specifically asked to be associated with the submissions and contentions of Mr. *Irvine* on the topic last discussed, and I now, as promised, record that fact.

For the rest, the respective rights of the Crown and of the defendant in any given contingency must, I think, be determined by a consideration of the provisions of the Licensing Act, 1908. The right conferred by the licence is a right having its source or origin exclusively in the statute. The incidence, character and effect of the licence must, therefore, be determined by reference to the authority under which it was issued. In this respect, there was no difference between the contentions of any of the parties. Mr. *Tompkins*, for his contention that the licence runs with the land directly or indirectly, depended entirely upon a reference to particular sections in the statute. Such judicial decisions as he referred to were advanced, as I understood him, more by way of demonstrating the consonance of English authority with what he contended was the dominant policy of the New Zealand Act. The cardinal features of the position in his submission were:

(1) That the defendant had no right at any stage to the buildings or other improvements themselves, her rights in respect of them being compensatory in character.

(2) That she has no right of disposition of the buildings and improvements to a new tenant or to any outsider.

(3) That she has no right of compensation against the landlord.

(4) That she has no right of renewal of the lease.

(5) That her interests might be entirely terminated by the Crown paying the compensation prescribed under cl. 8 of the lease.

(6) That only if the auction at the upset rental is successful has she a right to payment from a new tenant of the sum assessed as the value of the improvements.

(7) That only as a member of the public may she bid for a new lease.

(8) That there are no provisions in the lease for the payment by the Crown for any thing except, at its election, compensation for improvements and that on such payment the premises as a going concern, including licence and goodwill, vest in the Crown.

These considerations, he suggests, show that the defendant has no ownership of the premises at all, but merely a limited right to compensation giving her no right to the buildings themselves and reserving to her only a chose in action.

The contention of the Crown, on the other hand, was, broadly speaking, that a licence is a personal licence granted to the licensee and that judicial authority is inconsistent with the ownership by the owner of any interest in a licence unless that interest is conferred by contract. The effect of the various sections on which the plaintiff relied was sought to be explained away on various footings. It was further contended that

none of the conditions upon which the Crown could have acquired the licence have been fulfilled because the licensee is still in lawful possession. Finally, it was said that, in any event, the clause in the lease giving the tenant a right to drop the licence if excessive building demands are made shows that the licence is the property of the tenant.

Clearly, what is necessary is an examination of the provisions of the Act as a whole to determine what the rights of the respective parties are in the light of the position as it exists.

The first section to which Mr. *Tompkins* referred as indicating that a licence runs with the land directly or indirectly was s. 91, which prescribes that it is a ground of objection to the granting of a licence that premises are out of repair or have not the accommodation required or reasonable accommodation as the case may be.

For the Crown, it was denied that there is anything in the section which indicates that the owner of the premises has any proprietary or other interest in the licence. It was not denied that a licensee is granted to be exercised in specified premises so that the state of repair of those premises is material.

The next sections to which reference was made were ss. 148 and 149. These sections deal with the keeping of records and of a register of licences. In respect of s. 149, Mr. *Tompkins* drew attention to the use in subs. (2) of the use of the word "owners" in the plural thus, he suggested, indicating that there may be more than one owner.

Little need be said of these sections beyond the fact that they do show close association between licences and the premises to which they relate. That aspect of the matter is, however, more clearly disclosed by the form of application for licences prescribed in the Eighth Schedule. This Schedule shows that an application for an accommodation licence is for a certificate authorizing the issue of the licence for particular premises. So, too, is the certificate authorizing the issue of an accommodation licence pursuant to the Tenth Schedule which again is expressed to be "for" particular premises. These prescribed forms carry somewhat further the requirement of s. 148 that the record of applications should show the premises in respect of which each application is made. The provision of s. 149 (2) Parts (1) and (2) are to the same effect.

Mr. *Irvine's* answer in respect of both these sections is, first, that the sections are a recognition that the type of premises available is important and, secondly, that the maintenance of a register of licences is necessary apart from any question of the ownership of licences or rights under them, and that entries with respect to owners is necessary because, in specified events, owners have to be notified.

Mr. *Tompkins* next quoted ss. 152 and 153, the former of which requires that every person applying for a new licence or for the renewal of a licence must state the name of the owner or mortgagee, if any, of the premises in respect of which such application is made. Section 153 provides a method by which any person entitled may have his name entered as owner in place of the person appearing on the register as owner. Mr. *Irvine* disposes of ss. 152 and 153 by saying that they are merely machinery provisions and indicative of nothing which is material here.

Section 124, to which Mr. *Tompkins* next refers, is admittedly more germane to the present question. That section confers jurisdiction upon a Licensing Committee when a licensee has been legally ejected from any licensed premises to grant a certificate of transfer of the licence to a proposed new tenant of the owner on the owner's application. This, it is admitted by the Crown, confers a benefit on an owner of premises,

but it is contended that it does so incidentally only and not by way of recognition of any right of ownership vested in the owner of the premises; the true purpose, it is said, is the protection of the public to save the loss of the licence and the benefit to the owner is merely incidental.

- 5 This answer is directed to a denial of any proprietary right of the owner in the licence, but it does not modify the inference to be drawn from the fact that, if a licensee is ejected, the owner has a right of appointment of a new holder of the licence in respect of some premises subject to the approval of the Licensing Committee. It was suggested that the  
10 judgment in *Ex Parte Berry: Re Kessel* (1936) 36 N.S.W.S.R. 485 had some application to the section in so far as it suggests that the section may be directed only to a case in which the owner has some contractual right to the licence.

- Whether there is justification for that contention in the light of the  
15 terms of the New Zealand Licensing Act is a question that will have to be considered later. In the meantime, it is sufficient to take cognizance of the fact that, when a licensee is ejected, s. 124 ostensibly confers upon the owner of the premises the right to apply in conjunction with a new tenant appointed by him for a special certificate of transfer of the  
20 licence.

- Mr. *Tompkins* next referred to s. 125 which in terms, *inter alia*, governs the position where a licensee deserts the licensed premises or where, during the currency of the licence, the licensee ceases to occupy the premises or his tenancy is determined by effluxion of time or by notice to quit or by  
25 any other means whatsoever other than bankruptcy and he refuses or neglects to transfer the licence. In such circumstances, the Chairman of the Licensing Committee and any two members of the Committee may authorize any person they think entitled to the benefit of the licence to carry on the business on the licensed premises for the remainder of  
30 the term for which the licence was granted.

- The circumstances here ostensibly brought this section into effect when the defendant's lease expired in May, 1950, for at that point of time, in terms of the section, the Crown could have applied for an authority under the section to carry on the business as if the licence had been  
35 formally transferred to it.

- As to this section, Mr. *Irvine* says that, initially, the Licensing Committee is given a discretion to decide who they think is entitled to the licence, but it might select some person whose interests were adverse to those of the owner. In any event, he says, the power arises only in  
40 certain defined circumstances and when the licensee refuses or neglects to transfer the licence when justly required to do so; "justly", it is said, there means "lawfully" or "rightly" so that the request for a transfer must rest upon some obligation of the licensee to transfer. That obligation, it is said, cannot be implied and cannot arise at common law,  
45 so it must have its origin in the Act or in some contract between the parties. The defendant, it is said, is here subject to no such obligation.

- This contention is met with the difficulty that, as to subs. (a), the use of the disjunctive "or" differentiates between the power of the committee when a licensee deserts the premises and those circumstances in  
50 which he refuses or neglects to transfer when justly required to do so. As to subs. (b), the use of the disjunctive distinguishes between those circumstances in which the licensee ceases to occupy the premises, where his tenancy is determined by effluxion of time or otherwise than by bankruptcy, and those circumstances in which he refuses or neglects to  
55 transfer when justly required to do so.

The next section of importances is. 126 which governs the position where a licensed person becomes personally disqualified or has his licence forfeited. Then it is prescribed that, upon the application of the owner where the owner is not the occupier, the Committee, upon being satisfied that the owner was not privy to, nor a consenting party to, the act of his tenant and that he has legal power to eject the tenant, may authorize an agent to carry on the business until the end of the period for which the licence was granted. The section, as Mr. *Tompkins* pointed out, provided for a right in the Crown to acquire the licence if the defendant had become personally disqualified or had her licence forfeited.

Mr. *Irvine's* answer to that was that this right is only incidental and cannot be made the subject of any deduction of legislative intention.

What evolves from ss. 125 and 126 and other sections is that, while a licence is a personal licence in the sense that it authorizes only the licensee to exercise the rights conferred by it, nevertheless the owner has statutory rights by virtue of which he may, in some instances, determine the tenancy of the licensee and acquire a licence in substitution for himself or his nominee. In other words, on the plain meaning of the language of the statute, the rights of the licensee are subject to continuing paramount rights in an owner to sustain the licence in force in respect of his premises. At the same time, it must be conceded that s. 125 does invite consideration by the committee as to the person entitled. Naturally, Mr. *Tompkins* contends that, having regard to the other provisions of the statute, the person entitled is the owner. Mr. *Irvine*, equally naturally, contends that he is only entitled, if he is so entitled, by some contract.

The next section to which reference was made was s. 127. That section, which deals with the removal of licences, requires that notice shall be given to the owner of the premises from which the licence is to be removed. That section must be read with s. 129 which gives the owner of the premises to which the licence is attached an absolute power of veto. This is a crucial provision and one which markedly distinguishes the licensing legislation of New South Wales from the legislation of this country. In terms, it gives the owner of the premises absolute power to compel the licensee to maintain unbroken the association between the licence and the premises.

This section presented Mr. *Irvine* with considerable difficulty. He contended that, if read literally, the section would enable the owner of licensed premises to prevent the removal of a licence however much that removal might be in the public interest. He, therefore, suggested that s. 129 should be read as containing some qualification such as "unless it is satisfied that no valid or just or sustainable objection to such removal is made by the owner of the premises." Only compelling circumstances would warrant the introduction of language in that way, and all rules of interpretation are opposed to it.

Mr. *Tompkins* next referred to ss. 254, 255 and 256. Section 254 first requires that notice should be given by the Clerk of the Court to the owner of premises of every conviction of the tenant of licensed premises if the offence of which the tenant was convicted is one the repetition of which might render the premises liable to disqualification. It then prescribes that, notwithstanding any covenant in any lease or any other instrument, the tenant shall be deemed to have forfeited his lease and the owner or the immediate landlord may forthwith enter into and take possession of the premises and evict the tenant. The remaining sections are consequential.

These sections again indicate the right of the landlord to acquire the licence in the conditions postulated by the section and their force is scarcely, if at all, mitigated by Mr. *Irvine's* suggestion that the sections are drawn with the order of things in view where, in most cases, an owner has a reversionary interest in the licence. This is an adaption of the judgment of *Sir Frederick Jordan, C.J.*, in *Metropolitan Theatres, Ltd. v. Harris* (1935) 35 N.S.W.S.R. 228) and *Ex Parte Berry: Re Kessell* (1936) 36 N.S.W.S.R. 485). Sections 255 and 256 were said to be machinery sections only, but that suggestion, on the face of it, seems inadequate.

Finally, reference was made to ss. 293, 294, and 295, to s. 11 (3) of the Licensing Amendment Act, 1910, and to various sections of the Licensing Amendment Act, 1948, namely, ss. 32, 34, 38, 39, 45 and 46, all of which sections, it was said, show that the owner of licensed premises has an interest in every licence granted in respect of the premises.

Section 11 (3) of the Licensing Amendment Act, 1910, was said by Mr. *Irvine* not to indicate any right in the owner in respect of the licence. It was, it was suggested, merely a recognition that owners would have derelict premises on their hands and so should get first consideration on a regrant of licences.

Sections 32 and 33 of the Licensing Amendment Act, 1948, were, as I understood Mr. *Irvine*, said by him to relate only to notices and so to be machinery. As to s. 38, Mr. *Irvine* said that this section raised a point relating to some of the cases quoted having relation to the effect of an existing licence and the value of licensed premises. That, he said, was a *de facto* effect, and that the question now in issue was the ownership of the licence, not the price at which a sale by the Crown to the defendant was proposed. Sections 39, 45 and 46, he said, had no bearing.

It is in the light of the true meaning and effect of these statutory provisions that the question asked must be answered. It seems beyond question that an accommodation licence of this kind is a personal licence to the licensee and, as such it is not, at common law, capable of assignment or transfer. It is, as was said by the Full Court of Victoria in *Anthones v. Anderson* (1887) 14 V.L.R. 127, 142 "A licence to an individual for particular premises till it is taken out of him by legal authority". It is open to question whether such a licence is in any sense property at all. That it is not, was held in *Kelly v. Montague* (1892) L.R. Ir. 429).

What evolves, then, in the light of the terms of the Act as properly understood is that a licensee is, by the licence, authorized to exercise the powers given by the licensee but only on the premises to which the licence relates and subject to the statutory rights of the owner of the premises. Any transfer of the licence is subject to the dominant discretion of the Licensing Committee, and any transfer of the licence from the premises to which it relates to any other premises is not only subject to statutory limitations as to distance but also to the uncontrolled discretion of the Licensing Committee and to the absolute right of veto to which the owner of the premises is vested in terms of s. 129.

No consideration of the rights of individuals can be divorced from consideration of the public interest which was one of the paramount purposes of the legislation as a whole. That interest is controlled by the Licensing Committee and, whatever view one may take of particular sections of the Act, it is reasonable to anticipate that some of those provisions will enable the committee to protect the interests which it was

established to conserve. This is the phase of the matter to which *Sir Frederick Jordan, C.J.*, adverted in *Ex Parte Berry: Re Kessel* (1936) 36 N.S.W.S.R. 485). After adverting to certain sections of the New South Wales Act which, he said, were not inserted for the purpose of conferring on the owner of the premises an interest in the licence adverse to the licensee but for the purpose of enabling the licence to continue to be exercised in the place in which it was to the public interest that it should continue to be exercised, he said: "Its" (i.e. the licensing authority's) "chief concern is the public interest. No doubt, the conservation of this may lead to owners in some cases reaping where they have not sown, by being able to obtain for themselves, by reason of their ownership of the premises, a licence the original issue of which may have been due wholly to the activities of the licensee. But when the licensee has lost possession of the licensed premises, and it would not be in the public interest to allow the licence to be exercised elsewhere, there is no reason why the licensing authorities should allow him to play dog in the manger by permitting his objections to prevent the exercise by another of a licence which he can no longer exercise himself" (*ibid.*, 492).

These statements were made in respect of legislation which differs from ours in several respects and principally in this, that, under New South Wales legislation, the owner of the premises has no absolute right of veto to a transfer of the licence from the premises in respect of which it attaches.

Here the Licensing Committee, by granting the licence in respect of the present premises, has, in effect, declared that it is in the public interest that those premises in their local situation should be licensed premises and the licence cannot—and even then subject to strict limitations—be transferred to other premises without the consent of the Licensing Committee and subject to the power of veto of the Crown as owner.

This being so, it is impossible to escape the conclusion that ss. 124, 125, 126, 127, 129, 254 and 256—many of them severally, but all of them in conjunction—indicate that, whether a licence is property or not, and whether it is a personal licence to the licensee and no more, yet nevertheless it is a licence which the owner of the licensed premises is entitled, with the consent of the Licensing Committee, to acquire for himself or his nominee in substitution for any licence enjoyed by any existing tenant of the premises when the circumstances envisaged by the sections or any of them in fact pertain.

In the present instance the case fell, at the determination of the lease in May, 1950, within the express terms of s. 125 (b) and, pursuant to that section, the Crown might, if the defendant had refused to transfer the licence, have applied to have someone selected by itself authorized to carry on the licence. The same position will accrue again when the Crown determines the tenancy at will which now subsists. That s. 125 would, in such circumstances, apply and that the Crown is entitled to the authority mentioned in the section seems inescapable, for who else could be entitled to the benefit of the licence in such circumstances? The defendant, having lost her right to occupy the premises in which alone the licence can be exercised, and being unable to take the licence away from those premises, only the owner could be justly entitled to the benefit of the licence and justly entitled to carry on the business for the remainder of the term for which the licence was granted.

The other sections quoted by Mr. Tompkins are confirmatory of this view, particularly ss. 124 and 126. It seems to me, in consequence, 55



that there is an unreality in suggesting that the defendant is in any way entitled to the accommodation licence upon the determination of the tenancy and in the suggestion that the Crown, as owner, is not entitled to acquire a licence for itself or its nominee in respect of the premises upon that determination.

There is nothing in any of the cases quoted by Mr. Irvine which conflicts with this view. The case which helps best is *Metropolitan Theatres, Ltd. v. Harris* (1935) 35 N.S.W.S.R. 228 in which the learned Chief Justice held that such rights as are given an owner by the New South Wales statute are given to him to enable him to protect such rights as he may have with respect to the licence by virtue of any agreement, express or implied, between himself and the holder of the licence, and that, if the licensee holds the licence unfettered by any agreement, trust or other obligation which gives the owner some interest in it, there is no reason why any regard should be paid to the wishes of the owner as to the survival or disposition of the licence.

The answer to all that is, first, that the learned Chief Justice found occasion to qualify that view considerably in *Ex Parte Berry: Re Kessell* (1936) 36 N.S.W.S.R. 485 by reference to the rights which might accrue to an owner under the statute in consequence of the exercise of its function by the Licensing Committee of conserving the public interest; but the more decisive answer is that our legislation, whilst in some respects similar to the New South Wales Act, is in other respects different and particularly in this, that under our Act the owner of the premises can prevent the removal of the licence of his own motion and without being subject to control by any person or authority.

In the result, it can only be concluded that, once the right of occupancy of the premises by the defendant is terminated, she can have no further interest in the licence. Until then, it is hers; she can sell it and with it the goodwill which attaches to it, but, after her right of occupancy is gone, her interest in the licence ceases and the right to acquire a new licence for its nominee becomes vested in the Crown.

I answer the question asked in the summons in that sense.

I have not specifically adverted to the question of goodwill because in the argument the only goodwill discussed—and that somewhat slightly—was the goodwill attaching to the licence and, by virtue of the licence, to the licensed premises: this, in contradistinction to the personal goodwill of the licensed, necessarily follows the licence, original or substituted, by virtue of which the premises are used as licensed premises. It attaches to the premises in virtue of the licence, and so vests in the owner when the premises revert to the owner and he gets a licence in respect of them.

The Crown assumed the responsibility of disclaiming any interest in the licence and of supporting the contention of the defendant that she was alone entitled to the licence, and that the Crown had no rights in respect of it. In a very real sense, therefore, the Crown assumed the whole responsibility of the resistance to the case built by the plaintiff. In such circumstances it should, I think, be asked to bear the major portion of the costs. Costs are allowed to the plaintiff against the Crown in the sum of £50: against the defendant, the sum of £25. The aggregate sum in respect of disbursements as allowed by the Registrar is to be paid equally by the Crown and the defendant.

*Question answered accordingly.*

Solicitors for the plaintiff: *Tompkins and Wake* (Hamilton).

Solicitors for the defendant: *King, McCaw, and Smith* (Hamilton).

Solicitor for the Crown: *Crown Law Office* (Wellington).



## ATTORNEY-GENERAL, EX REL. PALMERSTON NORTH CITY CORPORATION v. PRINCE

SUPREME COURT. Palmerston North. 1952. May 15; July 25. HUTCHISON, J.

*Town-planning—Local Authority refusing Permission to erect Building—No Town-planning Scheme Provisionally Approved—Right to refuse Application on Grounds that Erection of Proposed Building in Contravention of Town-planning Principles or Interfering with Amenities of Neighbourhood—Town-planning Act, 1926, s. 34 (1)—Town-planning Amendment Act, 1929, s. 5.*

Where a local authority has no provisionally approved town-planning scheme, it may refuse an application for consent to the erection of a building on the second or third ground set out in s. 34 (1) of the Town-planning Act, 1926 (as amended by s. 5 of the Town-planning Amendment Act, 1929) namely, that the erection of such building would be in contravention of town-planning principles or would interfere with the amenities of the neighbourhood.

*Wong v. Northcote Borough* ([1952] N.Z.L.R. 417; [1952] G.L.R. 303) applied.

*Mt. Eden Borough v. New Zealand Wallboards, Ltd.* ([1945] N.Z.L.R. 711; [1945] G.L.R. 361) and *Fenton v. Auckland City Corporation* ([1945] N.Z.L.R. 768; [1945] G.L.R. 403) distinguished.

The defendant, a resident of the City of Palmerston North, who carried on his occupation as a plasterer at his house, applied in writing to the Palmerston North City Council for a building permit to erect on his property a shed to be used as a cement and lime storeroom. His application was finally declined by the Council on October 29, 1951, by a resolution, which was as follows:

"That the City Engineer reported that Mr. M. Prince of Milsom had made application to erect a storeroom on the street frontage of his property 'No. 1 Seaforth Avenue and it was decided that the Council resolve to absolutely refuse its consent to the erection of a store and prohibits the erection thereof as such work would be in contravention of the Council's 'Town-planning Scheme in that it would interfere with the amenities of the 'neighbourhood'."

The defendant had put in the foundations for the shed before he made his application for a permit, though he knew that he had to obtain a permit to build it; and he completed the erection of it later. There was not, at any time, any ground for a view on his part that there was any more than a possibility of the Council's approving the erection of the shed on the street frontage, and the defendant built the shed there wholly without a permit and partly after the application for a permit was refused.

The plaintiff claimed a declaration that the building erected by the defendant in November, 1951, had been erected in contravention of a determination of the Palmerston North City Council made under s. 34 of the town-planning Act, 1926, on October 29, 1951, and a mandatory injunction directing the defendant to demolish such building forthwith; or, alternatively, a declaration that the defendant was not entitled to use the building or permit it to be used for any purpose other than permitted uses in a residential or local commercial district under the town-planning scheme of the Palmerston North City Council, as such permitted uses are restricted in the New Zealand Standard Code of Clauses for Town-planning Schemes, and an injunction restraining the defendant from using the building or permitting it to be used for any purpose other than permitted uses in residential or local commercial districts as such permitted uses are restricted in such Standard Code.

Paragraph 7 of the plaintiff's statement of claim was as follows:

"7. On or about the 29th day of October 1951 after considering the said application of the Defendant referred to in the preceding paragraph the Palmerston North City Council determined pursuant to Section 34 of 'The Town Planning Act 1926' that consent to the erection of the said building in respect of which the Defendant made the said application be refused absolutely and further the erection of such a building be prohibited."

*Held*, 1. That the City Council, by its resolution of October 29, 1951, had validly declined the defendant's application under s. 34 (1) of the Town-planning Act, 1926 (as amended by s. 5 of the Town-planning Amendment Act, 1929) on the ground that it appeared to the Council that the erection of the proposed building on the street frontage site for the purpose of a store would interfere with the amenities of the neighbourhood.

2. That the plaintiff's pleadings (which, in para. 7, did not specify on which ground it was claimed that the Council was acting, though the earlier paragraphs showed that the allegation was that the Council acted on the ground that the erection of the building would be in contravention of the Council's town-planning scheme) be amended by adding an alternative plea that the Council refused the application on the ground that the proposed building would interfere with the amenities of the neighbourhood.

3. That the plaintiff be granted an injunction (as sought in para. 3 of the alternative prayer), the injunction to be suspended for two months from the date of this judgment to enable the defendant to lodge and prosecute an appeal to the Town-planning Board under s. 34 (2) of the Town-planning Act, 1926, against the determination of the City Council, if he should be so advised.

ACTION in which the plaintiff claimed a declaration that a building erected by the defendant at No. 1 Seaforth Avenue, Palmerston North, in or about the month of November, 1951, had been erected in contravention of a determination of the Palmerston North City Council made under s. 34 of the Town-planning Act, 1926, on or about October 29, 1951, and a mandatory injunction directing the defendant to demolish such building forthwith; or, alternatively, (1) a similar declaration to that sought in its primary claim, (2) a declaration that the defendant was not entitled to use the building or permit it to be used for any purpose other than permitted uses in a residential or local commercial district under the town-planning scheme of the Palmerston North City Council, as such permitted uses were restricted in the New Zealand Standard Code of Clauses for Town-planning Schemes, and (3) an injunction restraining the defendant from using the building or permitting it to be used for any purpose other than permitted uses in residential or local commercial districts as such permitted uses were restricted in such Standard Code.

The defendant was a resident of the Milsom area which became part of the City of Palmerston North on April 1, 1950. He carried on his occupation as a plasterer at his house. On August 15, 1951, the defendant applied in writing to the Palmerston North City Council for a building permit to erect on his property a shed to be used as a cement and lime storeroom. That permit he did not receive and his application was finally declined by the Council on October 29, 1951. The resolution of the Council appeared from the minute of October 29 :

That the City Engineer reported that Mr. M. Prince of Milson had made application to erect a storeroom on the street frontage of his property No. 1 Seaforth Avenue and it was decided that the Council resolve to absolutely refuse its consent to the erection of a store and prohibits the erection thereof as such work would be in contravention of the Council's Town Planning Scheme in that it would interfere with the amenities of the neighbourhood.

The defendant had put in the foundations for the shed before he had made his application for a permit, though he knew that he had to obtain a permit to build it, and he had completed the erection of it later. There was some conflict of evidence as to whether the building of the shed was

considerably advanced before the permit was refused, or whether no more was done up to that time than the putting in of the foundations. It was, however, clear to the learned Judge that, before anything more than that was done, the Town-planning Officer of the City Council had a discussion with the defendant at the property, as a result of which dis-

cussion the defendant knew that it was likely that the Council would not

grant a permit for the erection of the shed, as proposed, on, or substantially on, the street frontage. (Some point was made at the hearing that the shed was not "on" the street frontage, but some 18 inches back from the street frontage. Its position was quite reasonably described under the circumstances as "on" the street frontage, and I shall so describe it.) His Honour also thought it clear that the main objection that the officers of the Council saw to the proposed shed was its location on the street frontage, and that they would have been prepared to recommend to the Council approval of its erection as an extension to a shed that already stood on the back of the defendant's property. There were, however, from the defendant's point of view, practical objections to the back of the property as a location for the shed. There was not, at any time, any ground for a view on the part of the defendant that there was any more than a possibility of the Council's approving the erection of the shed on the street frontage, and the defendant built the shed there wholly without a permit and partly after the application for a permit was refused.

*J. A. L. Bennett*, for the plaintiff.

*G. I. McGregor*, for the defendant.

*Cur. adv. vult.*

HUTCHISON, J. [After stating the facts, as above:] The plaintiff bases the claim on s. 34 of the Town-planning Act, 1926, as amended by s. 5 of the Town-planning Amendment Act, 1929, and the first question for consideration is whether the City Council validly declined the application under the authority of that section. The section, as so amended, reads:

(1) Any local authority that by this Act or by Order in Council under this Act is under an obligation to prepare a town-planning scheme or an extra-urban planning scheme, and any local authority that, not being under an obligation to prepare a scheme as aforesaid, has resolved, pursuant to section thirteen or to section twenty-five of this Act, to prepare a scheme, may at any time before the scheme has been approved by the Town-planning Board absolutely or conditionally refuse its consent to the erection of any building or the carrying-out of any work within its district, or may definitely prohibit the erection of such building or the carrying-out of such work, if it appears to such local authority that the erection of such building or the carrying-out of such work would be in contravention of the scheme if it had been completed and approved, or would be in contravention of town-planning principles, or would interfere with the amenities of the neighbourhood.

(2) Any person injuriously affected by any determination of a local authority under this section may appeal from that determination to the Town-planning Board.

(3) The determination of the Town-planning Board for the purposes of this section on any question relating to principles of town-planning shall be conclusive and shall bind the local authority.

It was submitted for the defendant that the Palmerston North City Council had, at the material time, no town-planning scheme, provisional or otherwise.

The evidence shows that on July 22, 1946, the City Council resolved:

That the Town Planning Scheme and Plan be provisionally approved and submitted for approval to the Town Planning Board subject to the Town Planning Scheme being first submitted to the City Solicitors for perusal.

The town-planning scheme and plan referred to consisted of a civic survey map, a zoning map and the New Zealand Standard Code of Clauses for Town-planning Schemes, dated February, 1941. The copy of the Code put in as the one referred to in the resolution of the Council contains a

number of alterations in pencil and a number of blanks. On March 28, 1951, after the addition of the Milsom area to the City, the Council resolved:

That the zoning plan submitted to the meeting for the new City area be provisionally approved.

The main submission for the defendant on this point is that, having regard to the blanks and alterations in the copy of the Code, and to the fact that the resolution expresses itself as being subject to the scheme's being first submitted to the City Solicitors and that there is no proof that it was ever so submitted, the resolution of July 22, 1946, is ineffective, and that the position is not helped by the resolution of March 28, 1951.

It seems to me that there may be much in this submission, but I find it unnecessary to form a concluded view on it. Three grounds are stated in s. 34 as justifying the refusal of consent to the erection of a building; (a) that the erection of the building would be in contravention of a town-planning or extra-urban planning scheme if it had been completed and approved; (b) that it would be in contravention of town-planning principles; (c) that it would interfere with the amenities of the neighbourhood. In my view, the resolution of October 29, 1951, proceeds mainly on the question of the amenities of the neighbourhood, and it would be reading it with undue strictness to give it operation only if there were a provisional town-planning scheme in existence. The right of a City Council to decline an application on the second or third ground stated in s. 34 does not depend on its having provisionally approved a town-planning scheme. *F. B. Adams, J.*, said in *Wong v. Northcote Borough* ([1952] N.Z.L.R. 417; [1952] G.L.R. 303). "The period of 'time' before the scheme has been approved" includes the period before "it has been prepared; and in that period a local authority is entitled to act at least on the second and third of the specified grounds—viz., contravention of town-planning principles and interference with amenities. Where it is a matter of contravention of town-planning principles or interference with amenities, there is no reference to any 'prepared scheme'; and, with regard to those matters, the words 'at any time before the scheme has been approved' can quite well include the period that elapses before the local authority has prepared a scheme. Such period is plainly within the words, and there is nothing to compel a contrary interpretation. I think, therefore, that, at least to the extent indicated, a local authority may rely on s. 34 even though it has not yet prepared or to begun to prepare a scheme, and its decisions thereunder need not have reference to any particular or ascertainable scheme. The corresponding but different words of the original enactment were construed in *James v. Waimairi County Council* ([1929] N.Z.L.R. 449; [1929] G.L.R. 32) by *Adams, J.*, in the Court below (*ibid.*, 451; 33) and by *Herdman, A.C.J.*, and *Kennedy, J.*, in the Court of Appeal (*ibid.*, 456; 169) as including the whole period of time between the commencement of the Act and the approval of a scheme; and, in my opinion, the section in its amended form covers similarly the whole period from its enactment until a scheme has been approved. In *New Zealand Breweries, Ltd. v. Auckland City Corporation* ([1938] N.Z.L.R. 428; [1938] G.L.R. 261) *Callan, J.*, treated the section as "being applicable in a case where, although considerable progress had been made towards the completion of a scheme, it was still incomplete and had not been submitted for approval" (*ibid.*, 420, 421; 304, 305).

Counsel for the defendant submitted a contrary view based on certain observations in the judgments in *Mount Eden Borough v. N. Z. Wal-*

*boards, Ltd* ([1945] N.Z.L.R. 711; [1945] G.L.R. 361) and *Fenton v. Auckland City Corporation and Another* ([1945] N.Z.L.R. 768; [1945] G.L.R. 403) but, in each of those cases, a scheme had been provisionally approved, and the judgments point out that, at that stage, the local authority may act under s. 34. In each of the cases, the contrast made is between the time when a scheme has been provisionally approved by the local authority, and the time when the scheme has been finally approved by the Town-planning Board. Neither case is authority for a view that a local authority which is under an obligation to prepare a scheme may not act on the second or third ground stated in s. 34 where it has not yet provisionally approved a scheme.

The plaintiff's pleading as to the refusal of the defendant's application is contained in para. 7 of the statement of claim :

7. On or about the 29th day of October 1951 after considering the said application of the Defendant referred to in the preceding paragraph the Palmerston North City Council determined pursuant to Section 34 of "The Town-planning Act 1926" that consent to the erection of the said building in respect of which the Defendant made the said application be refused absolutely and further the erection of such a building be prohibited.

Paragraph 7 does not specify on which of these grounds it is claimed that the Council was acting, but the earlier paragraphs show that the allegation is that the Council acted on the ground that the erection of the building would be in contravention of the Council's provisional town-planning scheme. At the hearing, counsel for the plaintiff asked leave, if this should be necessary, to amend by adding an alternative plea that the Council refused the application on the ground that the proposed building would interfere with the amenities of the neighbourhood. The only objection made to such an amendment rested on a suggestion that the defendant would be prejudiced by the amendment on the question of an appeal to the Town-planning Board under subs. (2) of s. 34 of the Town-planning Act, 1926, but, as will appear later, I propose to allow the defendant a further opportunity so to appeal as he is so advised. In my opinion, the amendment should be made, and I deal with the case on the basis that it is made.

In my opinion, the Palmerston North City Council validly declined the defendant's application under s. 34 of the Town-planning Act, 1926, on the ground that it appeared to the Council that the erection of the proposed building would interfere with the amenities of the neighbourhood.

It is to be noted that the resolution declines the application to erect the building on the street frontage site for the purpose of a store. The resolution does not state, or even imply, that the Council would have refused the application if it had been for consent either to erect a storeroom at the back of the section or to erect something not a storeroom but, say, a motor garage on the street frontage. Such matters as those were not before the Council, the application being to erect a storeroom on the street frontage; but the evidence shows that, if the application had been for either of those matters, it probably would not have been declined.

Assuming there to have been in existence the provisional Town-planning scheme that the plaintiff contends that there was, the case for the plaintiff is that the Milsom area was zoned as a residential and local commercial area, and in such an area a motor garage of the size and location of the shed erected by the defendant would not be objectionable under the New Zealand Standard Code of Clauses for Town-planning Schemes. It was by reference to that zoning that the Council's view as to the amenities of the neighbourhood was formed and the case for the

plaintiff, on any view of it, is not put any higher than that. This, I think, is relevant to the question of what remedy should be granted to the plaintiff.

On this question, it is said in *Kerr on Injunctions*, 6th Ed. 40 :

- 5 The jurisdiction to grant a mandatory injunction (to demolish a building) is exercised with caution and is strictly confined to cases where the remedy by damages is inadequate for the purposes of justice, and the restoring things to their former condition is the only remedy which will meet the requirements of the case.

It is said in *18 Halsbury's Laws of England*, 2nd Ed. p. 24, para. 37 :

- 10 Where the injury done to the plaintiff cannot be estimated and sufficiently compensated for by damages, or is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done, or where the injury complained of is in breach of an express agreement, the Court will exercise its jurisdiction and grant a mandatory injunction, even  
15 though the expense and trouble of carrying out the mandatory injunction will be far in excess of any sum which could reasonably be awarded by way of damages. If, on the other hand, no substantial damage is proved or the injury admits of estimation and the evil can be abundantly compensated for by damages, a mandatory injunction will not be granted, but an inquiry will be ordered to ascertain the  
20 amount of the damages sustained.

A number of cases were cited affording the authority for these statements or exemplifying the application of the law. I have read these, but think it unnecessary to refer to them further.

- In this case, the defendant erected his shed without any permit and  
25 when, from early in its erection, he knew that the Council would be unlikely to consent to its erection in the position in which and for the purpose for which he wished to erect it. No remedy by way of damages is available. It was suggested for the defendant that the Council has open to it the remedy of prosecuting the defendant and having him fined,  
30 presumably under a by-law, for building the shed without obtaining a permit, and that this would be sufficient deterrent. Apart altogether from the fact that such a prosecution would now be out of time, I do not think that this would meet the position. It is the provisions of the Town-planning Act, 1926, and not those of the Council's by-laws, with  
35 which we are concerned. Reference was made, too, to s. 76 of the Statutes Amendment Act, 1941, especially subs. (2), and to s. 6 of the Town-planning Amendment Act, 1948, and it was submitted that, in the application for a mandatory injunction in this case, the Palmerston North City Council was claiming a greater right than it would have under those  
40 sections if a town-planning scheme were finally approved. Even if it were correct to say that a greater right is here sought than might be sought by a local authority under those sections, which is at least doubtful, this argument overlooks the fact that the plaintiff in the present case is the Attorney-General, as to which point see *Attorney-General v. Sharp*  
45 ([1931] 1 Ch. 121). I do, however, think that the plaintiff's alternative claim affords a remedy that will meet the requirements of the case and that it is unnecessary to order the demolition of the building.

- Though the defendant did not appeal to the Town-planning Board under s. 34(2) of the Town-planning Act, 1926, from the determination  
50 of the City Council when the City Engineer drew his attention to the fact that he had a right to do so, I think, particularly having regard to counsel's submission on the amendment to the statement of claim, that the defendant should be given another opportunity to do so if he is so advised. I do not see any need of either of the declarations sought in paras. 1 and 2  
55 of the plaintiff's alternative prayer, which, as I see them, are purely ancillary to and leading up to the injunction sought in para. 3 of the alter-

native prayer. The plaintiff will have the injunction sought in para. 3 of his alternative prayer, but the injunction will be suspended for two months from the date of this judgment to enable the defendant to lodge and prosecute an appeal to the Town-planning Board against the determination of the City Council if he is so advised. There will be liberty to apply if necessary for an extension of the period of suspension or on any other matter that arises consequent upon any such appeal.

The plaintiff will have his costs on the lowest scale with £4 4s. covering matters of discovery, and with witnesses' expenses and disbursements to be fixed by the Registrar.

*Judgment accordingly.*

Solicitors for the plaintiff: *Cooper, Rapley, Rutherford, and Bennett* (Palmerston North).

Solicitors for the defendant: *McGregor and McBride* (Palmerston North).

## CRIMP v. HOROWHENUA COUNTY.

COURT OF APPEAL. Wellington. 1953. March 31; April 1; July 14.  
FAIR, J.; STANTON, J.; NORTH, J.

*Countries—Water-supply—Special Rating Area—Water-supply installed therein—Part of Block of Land within Such Area and Part Outside It but within County Boundaries—Water-supply connected to House on Block within Special Rating Area—Owner extending Water-connection to House on Block but outside Special Rating Area—Council Authorized to make By-laws, for Whole or Part of County, including By-law dealing with County's Water-supply—Owner of Block acting without Authority in Defiance of Valid By-law—Ordinary Supply of Water given for Purposes of Land within Special Rating Area—County not attempting to cut off Water-supply—County entitled to seek Injunction to Restrain Owner from Continuing to draw Extra-territorial Supply—Countries Act, 1920, ss. 109, 182, 248, 249—Municipal Corporations Act, 1933, s. 82.*

In 1939, the respondent County created a water-supply special rating area for that portion of the Te Horo Riding known as the Waimaha Township. Pursuant to the authority of a poll of ratepayers in that area, a loan of £3,300 was raised by the County under the Local Bodies Loans Act, 1926, the interest and other charges in respect of the loan being secured by a special rate of 2d. in the £ upon the rateable value (on the basis of the capital value) of all the rateable property in the special rating area as defined in the special resolution passed for the purpose. The water-supply was installed, and a special by-law, entitled the Waimaha Township Water Supply By-law, 1939, was made and ordained by the Council in relation thereto. An Order in Council was issued on December 17, 1929 (*1929 New Zealand Gazette*, 3323), pursuant to s. 182 of the Counties Act, 1920, conferring on the County Council all the powers with respect to the supply of water for domestic or industrial purposes exercisable by a duly-constituted Borough Council under specified portions of the Municipal Corporations Act, 1920, and its Amendments. The powers so conferred are those now appearing in the Municipal Corporations Act, 1933, as ss. 82-84, 87, 88, Part XX (with the exception of ss. 251, 253, and 254), and s. 346.

The appellant was the owner and occupier of a block of land (containing in all approximately 6 acres), a small portion of which was within the special rating area and the greater portion of which was outside the area, though within the boundaries of the County. On or about October 23, 1942, the appellant's predecessor in title made application to the respondent for a permit to make a connection to the water-supply system for an ordinary water-supply in respect of that portion of the land situated within the special rating area. A permit to make the connection applied for was granted, the permission being expressly limited to an ordinary supply. The connection of water not only served a cottage upon the land within the special rating area, but also led to and supplied certain standpipes upon the adjacent land (outside the area), to enable a market-garden then operated upon such adjacent land to be watered.

In 1948, the appellant extended the water-supply line from the then existing reticulation to a more distant part of his land, on which was erected another dwellinghouse, in order to provide a domestic supply to that dwellinghouse, which was situated at a considerable distance beyond the boundary of the special rating area. The Council wrote to the appellant drawing attention to what was called the unauthorized connections outside the special area, and notifying him that a disconnection would be made at the expiration of fourteen days from that date. In spite of the appellant's protest, the water pipe-line on the appellant's property was cut by the Council at a point just beyond the boundary of the special area. The appellant thereupon reconnected the supply. Notwithstanding his representations to the Council with the object of arriving at some arrangement which would ensure to him the use of the water for his house beyond the special area, the Council, on March 28, 1949, again cut the pipe-line at the same point as before, and again the plaintiff repaired it. On April 6, 1949, the Council for the third time cut the pipe-line at the same point.

The appellant applied for an injunction to restrain the respondent's Council from trespassing by its servants or agents on the appellant's land, from interfering with the water-supply thereon, and from moving or removing any part of his property. His application was refused by *Hay, J.*, who gave judgment for the respondent County: [1952] N.Z.L.R. 557; [1952] G.L.R. 400.

On appeal from that judgment,

*Held* by the Court of Appeal, 1. That the appellant was obtaining a benefit to which he had no moral right: he was granted an ordinary supply of water in respect of the land which he owned in the special rating area, and, in terms of s. 82 of the Municipal Corporations Act, 1933, he paid for such supply by a rate calculated on the annual value of that land, and, without authority and in defiance of the County Council's by-law, he had extended that supply to service his land outside the special area; and this consideration would be sufficient to determine the present action against him, because the writ of injunction is an equitable remedy and will not be granted to a plaintiff to support an unconscionable claim.

*Litvinoff v. Kent* (1918) 34 T.L.R. 298) followed.

2. That s. 109 of the Counties Act, 1920, read in conjunction with s. 182 of that statute, authorizing the Governor-General to enable a County Council to establish a water-supply, and s. 82 of the Municipal Corporation Act, 1933 (which has, in effect, been incorporated in the Counties Act, 1920) are sufficient to authorize the making of by-laws, to apply to the whole County or to any part of the county specified in the by-law, for various specified matters, including the making of by-laws dealing with the County's water-supply.

3. That the respondent County's water-supply by-law was not invalid though it was not free from criticism.

*Everton v. Levin Borough* (*Ante*, p. 134) distinguished.

4. That the appellant could not justify his action in taking the extended supply, as the ordinary supply was, by the form of application in the by-law, related to specific premises, and it might not be used in, or extended to, other premises; and, further, the form of application contained an undertaking to observe "the by-laws relating to water-supply," and he had infringed the clauses of those by-laws.

*Great Northern Railway Co. v. Bradford Corporation* (1919) 83 J.P. 33) referred to.



5. That the appellant had been given and had chosen to retain an ordinary supply of water for his inside area ; the circumstances of the special rating area necessarily implied that, in the absence of a special contract, he must be prepared to hold and use it in accordance with the terms upon which he had obtained it within that area, *i.e.*, for the ordinary purposes of the land in the rating area ; and that, if he persisted in disregarding that condition, he could be restrained by injunction, or, perhaps, be obliged to submit to the loss of his supply.

*Dominion of Canada v. City of Lewis* ([1919] A.C. 505) applied.

6. That, accordingly, the appellant had no right to use the respondent County's water as he was doing.

*Quære*, whether, in the present state of the County's by-law, the specific rights of cutting off his whole supply or of entering on his private property for the purposes of cutting off the extra-territorial supply were available.

7. The provisions of ss. 248 and 249 of the Municipal Corporations Act, 1933, do not give the respondent County a right to cut off a supply of water in the circumstances of the present case.

8. That, although the respondent County had contended for a right to cut off the appellant's water-supply, it had not attempted or threatened to do so over a period of three years ; and this was an additional reason for refusing the appellant's application for an injunction.

*Semble*, That, if the County had sought an injunction to restrain the appellant from continuing to draw the extra-territorial supply of water, its application must have been granted ; and, if necessary, such action was open to it.

*Great Northern Railway v. Bradford Corporation* ( (1919) 83 J.P. 33) applied.

Appeal from the judgment of *Hay, J.* ([1952] N.Z.L.R. 557 ; [1952] G.L.R. 400) dismissed.

APPEAL from a decision of *Hay, J.*, reported ([1952] N.Z.L.R. 557 ; [1952] G.L.R. 400) refusing the appellant a writ of injunction restraining the respondent from cutting off a water supply on his property.

The facts, out of which the dispute between the parties arose, were summarized by the learned trial Judge in his judgment (*ibid.*, 559, 560 ; 400, 401) as follows :

In 1939, the Council created a water-supply special rating area for that portion of the Te Horo Riding known as the Waimeha Township. Pursuant to the authority of a poll of ratepayers in that area, a loan of £3,300 was raised by the Council under the Local Bodies Loans Act, 1926, the interest and other charges in respect of the loan being secured by a special rate of 2d. in the £ upon the rateable value (on the basis of the capital value) of all the rateable property in the special rating area as defined in the special resolution duly passed for the purpose. The water supply was installed, and a special by-law, entitled the Waimeha Township Water Supply By-law, 1939, made and ordained by the Council in relation thereto. An Order-in-Council had already been issued on December 17, 1929 (1929 *New Zealand Gazette*, 3323) pursuant to s. 182 of the Counties Act, 1920, conferring on the defendant Council all the powers with respect to the supply of water for domestic or industrial purposes exercisable by a duly constituted Borough Council under specified portions of the Municipal Corporations Act, 1920, and its Amendments. The powers so conferred are those now appearing in the Municipal Corporations Act, 1933, as ss. 82-84, 87, 88, Part XX (with the exception of ss. 251, 253, and 254), and s. 346.

Plaintiff was the owner and occupier of a block of land (containing in all approximately 6 acres), a small portion of which was within the special rating area and the greater portion of which was outside the area, though within the boundaries of the County. The portion lying within

- the special rating area, though only part of the land in the existing certificate of title, was delineated therein as a separate lot on a different deposited plan from that in respect of the remaining land in the title. Plaintiff in fact acquired the whole block by successive purchases between
- 1943 and 1946, and now held the block in three separate certificates of title. There was a cottage erected on that portion of the land within the special rating area. On or about October 23, 1942, plaintiff's predecessor in title (one F. C. Wilson) made application to the defendant Council for a permit to make a connection to the water-supply system for an ordinary water supply in respect of that portion of the land situated within the special rating area. Pursuant thereto, a permit to make the connection applied for was granted, the permission being expressly limited to an ordinary supply. Notwithstanding this, it appeared to be the case that the connection of water thereupon made in favour of
- F. C. Wilson not only served a cottage upon his land within the special rating area, but led to and supplied certain standpipes upon the adjacent land (outside the area), to enable him to water a market-garden then operated by him upon such adjacent land. This additional supply of water would clearly come within the definition of an extraordinary supply for the purposes of the by-law, though there was no evidence to show how it came to be installed. The affidavits filed by the defendant stated that no agreement had ever been made between it and F. C. Wilson in relation thereto, and that no authority or licence had ever been given to plaintiff or to any other person to make or place any water pipe-line or any stopcock or water toby on the land of plaintiff situated outside the special rating area. Such affidavits further showed that no part of the reticulation on the last-mentioned portion of plaintiff's land was placed there by the Council. The fact remained that such reticulation (but to the extent only of the standpipes in the market-garden) was in existence at the time of the acquisition of the land by plaintiff, and it seemed to be a fair assumption on the facts that the position in that respect was known to the Council.

- The circumstances which have given rise to the present litigation, however, were those connected with the action of plaintiff, in or about the
- year 1948, in extending the water supply line from the then existing reticulation to a more distant part of his land on which was erected another dwellinghouse. The purpose of the extension was to provide a domestic supply to such dwellinghouse, which was situated at a considerable distance beyond the boundary of the special rating area. On April 5, 1948, the Council wrote to plaintiff drawing attention to what was called the unauthorized connections outside the special area, and notifying him that a disconnection would be made at the expiration of fourteen days from that date. In spite of plaintiff's protest, the water pipe-line on plaintiff's property was on April 20, 1948, cut by the Council at a point just beyond the boundary of the special area. Plaintiff thereupon reconnected the supply. He continued to make representations to the Council with the object of arriving at some arrangement which would ensure to him the use of the water for his house beyond the special area, but the Council was obdurate in its attitude, and insisted on the disconnection. On March 28, 1949, it again cut the pipe-line at the same point as before, and again plaintiff repaired it. On April 6, 1949, the Council for the third time cut the pipe-line at the same point. Although the affidavits were silent as to what then transpired, it was to be inferred that plaintiff again repaired it, and that no further steps had so far been taken by the Council to disconnect the supply.

*Crimp*, for the appellant.

*Shorland* and *B. J. Cullinane*, for the respondent County.

*Cur. adv. vult.*

The judgment of the Court was delivered by

STANTON, J. [after stating the facts, as above:] On these facts, the appellant contends that the respondent has no right to cut off his water-supply as a whole, and has no right to enter on his private property to cut off his extra-territorial supply.

It is, of course, clear that the appellant is obtaining a benefit to which he has no moral right. He has been granted an ordinary supply of water in respect of the land he owns in the special rating area, and, in terms of s.82 of the Municipal Corporations Act, 1933, he pays for such supply by a rate calculated on the annual value of that land. The appellant has, without authority and in defiance of the County Council's by-laws, extended that supply to serve his land outside the special area, and, if he can do this in respect of the one house on that outside area, he can equally well do it for as many houses as he chooses to erect there. This consideration would be sufficient to determine the present action against him, because the writ of injunction is an equitable remedy and will not be granted to a plaintiff to support an unconscionable claim: see 13 *Halsbury's Laws of England*, 2nd Ed. 374; 18 *Halsbury's Laws of England*, 2nd Ed. 68, and *Litvinoff v. Kent* ((1918) 34 T.L.R. 298). However, that would not determine the rights and obligations of the parties, and, as these were fully argued before us, we think we should consider them and express our views upon them.

The respondent claims that the supply of water to the appellant's outside area is an extraordinary supply in terms of cl. 5 of the water-supply by-law, or, alternatively, that the appellant's whole supply, including the ordinary supply for his inside area, has become an extraordinary supply and that, therefore, under cl. 8 such extraordinary supply can be terminated, and, if necessary, entry on the appellant's property for this purpose is justifiable.

The appellant contends that the by-law is invalid and cites *Everton v. Levin Borough* (*Ante*, p. 134), but that case decides nothing more than that the particular by-law there in question was beyond the power given by the by-law making statute. In the present case, the power of the County Council to make by-laws is contained in ss. 108 and 109 of the Counties Act, 1920. Section 108 authorizes a County Council to make by-laws "for any matter concerning the good rule and government of the County", and in subs. (3) enacts that a by-law may be made to apply to the whole county or to any part of the county specified in the by-law. Section 109 provides that "without prejudice to the general powers conferred by the last preceding section" the Council may make by-laws on various specified matters none of which includes water supply.

We think, however, that these sections, read in conjunction with s. 182 of the Counties Act, 1920, authorizing the Governor-General to enable a County Council to establish a water-supply, and s. 82 of the Municipal Corporations Act, 1933, which has now been in effect incorporated in the Counties Act, and which requires the making of by-laws to enable the County Council's water-supply to function, are sufficient to authorize the making of by-laws dealing with the County's water-supply.

The County's by-law is not free from criticism or difficulty, and, in particular,

(a) "Consumer" is defined as meaning an owner of land within the area embraced by the waterworks, but the definition of "extraordinary supply" includes water supplied to "consumers who are not situated within the waterworks rateable area", which hardly makes sense.

(b) In cl. 8, there is provision that an extraordinary supply shall be terminable by three months' notice on either side "except in case of a wilful breach of any of the provisions of this by-law when the Council may waive such notice." "Waiver" here could properly only apply to notice to be given by the other side, that is, the consumer, not by the Council, although it is obvious that the intention was to enable the Council to "dispense with" notice. The clause goes on to provide that "on the expiration of such notice the Council may enter upon the private premises and cut off the supply", so that apparently the supply could not be cut off unless notice were actually given and allowed to run its full period.

(c) Although the by-law in cl. 5 defines "extraordinary supply" as including "water used by any consumer in excess of or not included in the ordinary supply", it may be that an extraordinary supply is only such when it arises from a supply given by the Council and not arising as the result of unauthorized use or extension of supply by the consumer, that this is in effect an unauthorized taking of water and not something which the by-law contemplates and authorizes subject to a right of determination as above-mentioned. If this be so, the right of entry under cl. 8 of the by-law would not be available, and, to give a specific right of entry to cut off, or even a specific right to cut off, the by-law would require to be amended so as to allow a supply to be cut off for unauthorized use of water or other breaches of the by-law.

We think it is clear that the appellant cannot justify his action in taking the extended supply. The ordinary supply is by the form of application in the by-law related to specified premises, and, by reason of cl. 24, it may not, in our view, be used in or extended to other premises. The form also contains an undertaking to observe "the by-laws relating to water-supply", and cls. 29 and 30 have also been infringed by the appellant.

In *Great Northern Railway Co. v. Bradford Corporation* ((1919) 83 J.P. 33), *P. O. Lawrence, J.*, had to consider an argument very similar to the one addressed to us by the appellant—namely, that, when water had been supplied to him by the County Council for domestic purposes, he could use it for such purposes on any part of his land. In the case cited, water was supplied to a railway company for one of its stations for railway purposes. The company, without the consent or knowledge of the supplying corporation, piped the water to another station and used it for railway purposes there. The Judge held that the company had no right to do this, and, in giving judgment, he said: "The plaintiffs say, as I understand their argument, 'True it is that s. 58 of the Waterworks Clauses Act, 1847, prohibits us from supplying water that has been supplied to us to any other person . . . but the supply to Wilsden Station is not a supply to any other person, because Wilsden Station belongs to us.' Further, they say that it does not come within cl. 18 of the Waterworks Clauses Amendment Act, 1863, which prohibits any person from using a supply of water for any purpose other than that for which he is entitled to use the same. They contend that the water was supplied to them at Denholme Station for railway

"purposes, and, being so supplied by meter, directly it has passed through the meter it becomes their property, and they can use it for railway purposes irrespective of the place where the water is used, and that they are not doing anything contrary to the Waterworks Acts—either the General Acts or their Special Acts—when they send that water a mile down their line to Wilsden Station. I say at once I cannot agree with that contention. To my mind the supply of water asked for and granted was the supply of water for premises, which were the railway station at Denholme" (*ibid.*, 35). It appears that an injunction was not granted "having regard to the parties", but liberty to apply was reserved.

Here the appellant has been given, and chooses to retain, an ordinary supply of water for his inside area, and the circumstances of the special rating area necessarily imply that, in the absence of a special contract, he must be prepared to hold and use it in accordance with the terms upon which he has obtained it within that area, *i.e.*, for the ordinary purposes of the land in the rating area. If he persists in disregarding that condition he may be restrained by injunction, or, perhaps, be obliged to submit to the loss of his supply. In *Dominion of Canada v. City of Lewis* (1919) A.C. 505, the Judicial Committee of the Privy Council pointed out that, in analogous circumstances, while the owners of taxable properties in the area of supply have a right to demand a water supply in respect of such properties, they must observe the conditions attached to the enjoyment of that right, and that, in respect of property where no such right existed, as, for example, Government non-rateable property, if the Government would not pay a reasonable price for water, then the supply authority might discontinue the supply "not as an exercise of an express power to cut it off, but as an implied correlative right, arising because the appellant was no longer prepared to perform his reciprocal obligation" (*ibid.*, 514).

These considerations are sufficient to indicate that the appellant has no right to use the Council's water as he is doing, but the specific rights of cutting off his whole supply or entering on his private property for the purpose of cutting off the extra-territorial supply may, in the present state of the County's by-law, be unavailable. Counsel for the respondent argued that the provisions of ss. 248 and 249 of the Municipal Corporations Act, 1933, gave the Council a right to cut off a supply of water in circumstances such as the present. We do not agree. Section 248 requires persons supplied with water to provide proper apparatus and keep the same in repair so as to prevent waste of water, and provides that, if there is default in providing or repairing such apparatus, or if water is wilfully allowed to run to waste, the Council may stop the supply. On the other hand, s. 249 gives to the Council a right of entry for the purpose of discovering whether water is being *wasted or misused*. The change in language must be regarded as deliberate, and renders it impossible to give the words in s. 248 the wider meaning contended for by the respondent. The right to cut off under s. 249, however, is limited to cases where the inspector is either refused admittance or obstructed in his examination and, therefore, cannot be called in aid by the respondent in the circumstances of the present case.

Although the respondent has contended for a right to cut off the appellant's water-supply, it has not for over three years attempted or threatened to do so, and this is an additional reason for refusing the appellant's application for an injunction. Had the County Council sought an injunction to restrain the appellant from continuing to draw

this extra-territorial supply, we think its application must have been granted. This was the course indicated in the *Great Northern Railway* case (1919) 83 J.P. 33) and, if necessary, similar action is now open to the County Council.

*Appeal dismissed.*

Solicitor for the appellant: *Norman E. Crimp* (Auckland).

Solicitors for the respondent: *Park, Bertram, and Cullinane* (Levin).

[IN THE SUPREME COURT.]

ATTORNEY-GENERAL, *EX RELATIONE* SMITH  
AND OTHERS *v.* COOK COUNTY.

SUPREME COURT. Gisborne. 1953. August 26. HUTCHISON, J.

*Counties—Ridings Representatives—Readjustment of Representation in Election Year*  
—Representation to be Proportionate to Rateable Value and Number of Electors  
at Time of Election—Counties Act, 1920, s. 60—Local Elections and Polls Amend-  
ment Act, 1946, s. 2 (9).

Section 60 of the Counties Act, 1920, as amended by s. 2 (9) of the Local Elections and Polls Amendment Act, 1946, is as follows:

"The Council shall, on some day in March preceding every general election, hold a meeting for the purpose of considering the representation of the different ridings, and shall, if necessary, adjust the same so that the representation of the several ridings shall, as far as possible, be proportioned to the rateable value and number of electors in each riding respectively."

The purpose of the section is that the representation of the several ridings shall be, as far as possible, proportioned to the two factors: rateable value and the number of electors at the time of the election. The action is to be taken in the month of March preceding the immediately pending election, which normally takes place in November. Where there is a disproportion in the representation of the ridings, s. 60 requires the County Council to remove this disproportion by making such adjustment as it should decide upon; and it is for the Council to decide what steps should be taken to remove the disproportion.

*Attorney-General ex Rel. Bradshaw v. Peninsula County* ([1951] N.Z.L.R. 328; [1951] G.L.R. 215) referred to.

*Semble*, That, if a Council gave fair and careful consideration to whether it ought to give more attention to rateable value or to the number of electors, if it could not produce a result fair to both factors, then its view could not be challenged.

In the present case, an application for a mandamus against the defendant's Council to carry out its duty under s. 60 failed only because the learned Judge could not be sure that the Council could physically comply with an order if it were in fact issued.

APPLICATION for a writ of mandamus to the Council of the defendant County to carry out the duty imposed on it by s. 60 of the Counties Act, 1920, as amended by s. 2 (9) of the Local Elections and Polls Amendment Act, 1946, which is as follows:

5 The Council shall, on some day in March preceding every general election, hold a meeting for the purpose of considering the representation of the different ridings, and shall, if necessary, adjust the same so that the representation of the several ridings shall, as far as possible, be proportioned to the rateable value and number of electors in each riding respectively.

*Iles*, for the plaintiffs.

*Blair*, for the defendants.

HUTCHISON, J. (orally) : There is no authority that I know of on s. 60 of the Counties Act, 1920, as amended, except the case that I myself heard and that counsel referred to : *Attorney-General, ex Rel. Bradshaw v. Peninsula County* ([1951] N.Z.L.R. 328 ; [1951] G.L.R. 215). Having read again the view that I there expressed, with which Mr. Blair, at any rate, expressed himself in agreement, I adhere to that view : "The section, in my view, calls for an adjustment, as far as possible, of representation triennially when any substantial disproportion manifests itself in the representation of the several ridings, having regard to rateable value and number of electors in each riding. The words 'as far as possible' recognize that there will be cases where it is not possible to make any reasonably precise adjustment," (*ibid.*, 330 ; 217).

That, then, is what s. 60 requires. Its purpose is so that the representation of the several ridings shall be, as far as possible, proportioned to these two factors, rateable value and number of electors at the time of the election, and that is why the action is to be taken in March preceding the election which normally takes place in November.

It is admitted that there is a considerable disproportion in the representation of the ridings, and, that being so, the section required the Council to act under s. 60 and remove this substantial disproportion by making such adjustment as the Council should decide on. It is for the Council to decide what steps should be taken, but the section requires it to take steps to remove the disproportion. The Council did not do anything in that direction.

I have no doubt at all that the gentlemen who constitute the Council gave their very best consideration to what they thought to be relevant matters ; they considered, no doubt, the various matters that were referred to by Mr. Blair and set out by the County Clerk in his affidavits ; and they decided that no change should be made.

While that decision was made, no doubt, in good faith, in my view, 30 it was wrong because these were not important matters for consideration. The important considerations were the rateable value and the number of electors in each riding.

The plaintiff asks mandamus against the Council to carry out its duty under s. 60, and that is the form in which the order would go if it were to go, because the steps that are to be taken are steps for the consideration of the Council itself.

Mr. Blair, while admitting that there was this disproportion and that no adjustment was made, submits that the order sought should not be made because it is unnecessary, and his submission is that the Council is moving in the direction of removing these anomalies but the time is not yet ripe to do it this year. I am against him on that point because I think that the purpose of the adjustment that is required by s. 60 is to do with the immediately pending election, and, therefore, I do not uphold the submission that an order would be unnecessary.

Then Mr. Blair says that the alteration would be ineffectual because an adjustment could not be completed before the election and points out that that, in fact, was the view that I took in the Dunedin case, in which the time was too short before the election. I leave that question for the moment.

He pointed out, too, that delay on the part of a plaintiff is against such a plaintiff. I do not think there was undue delay on the part of the plaintiff ; among other things, the obtaining of the Attorney-General's fiat would necessarily take a certain amount of time. He submitted that no sufficiently specific demand had been made to warrant



the issue of mandamus ; as I said, in the course of his argument, I am against him on the facts on that submission.

I am now left with the question of whether an order would be effectual if it were made, and that seems to me to be the only remaining question.

- 5 To be effectual it must be effectual so that everything can be in order at the time of the election that is due on October 31, instead of, as usual, in November. That matter has given me very considerable concern. I think that it is quite probable that what the witness Mr. Stone said is correct, that it would be a very close call. On the best consideration
- 10 that I can give to it, I think it would be wrong for me to issue a mandamus at the present moment. The issue of it is discretionary, and I find myself in the position that it is very difficult indeed to know whether, in fact, what is necessary to be done, could be done. It might be done ; but, on the other hand, it might not be done. It is to be remembered
- 15 that the Council will have to give some consideration as to how it is to be gone about before it can frame the notice of the meeting that inaugurates the special order. Then I can see that there are definitely difficulties about the electoral roll ; it might be that an alteration could be made quite simply, but I am not sure of it. I doubt if any
- 20 steps could be taken with the supplementary roll before the special order is completed otherwise than by taking preliminary steps in the office in anticipation. I am not quite sure about those matters. All I can say is that it seems to me that, with an order that imposes a duty on the County Council as heavy as a mandamus does, I must be sure
- 25 that the Council could carry out the duty before I issue the order against it, and I am not sure that it could do it. In the result, I am not prepared to issue a mandamus against the Council.

- It is useful that the matter has now been brought to Court. Years have gone by in which the relators and their predecessors have been patient, and, perhaps, it will not matter very much if another election goes by without any alteration being made, and we have the assurance of the Council of a move in the making of these alterations and its assurance that everything will be put in order for the next election after this one.

- 35 I was asked to give some general guidance to the Council on s. 60. That would be going beyond my duty. All I can say is, that the two factors referred to in the section are rateable value and number of electors and both factors have to be considered. I suppose, but I am not expressing any definite view on this, that, if the Council gave fair and
- 40 careful consideration to whether it ought to give more attention to rateable value or to number of electors, if it could not produce a result fair to both factors, its view could not be challenged. There were certain other matters mentioned in the argument—community of interest, mileage of roads, accessibility—but these can be minor only.
- 45 The factors by which the statute requires the representation to be adjusted are rateable value and number of electors.

- The result is that there will be no order for mandamus against the Council. I think that the plaintiff was thoroughly justified in bringing the case before the Court : it fails only because I cannot be sure that
- 50 the Council could physically comply with an order if it were, in fact, issued. In those circumstances, I think the plaintiff is entitled to his costs, and he will be allowed thirty-five guineas and disbursements to be fixed by the Registrar.

*Order accordingly.*

- 55 Solicitors for the plaintiffs : *Woodward, Iles, and Furness* (Gisborne).  
Solicitors for the defendants : *Blair and Parker* (Gisborne).



## AGNEW v. TAURANGA LICENSING COMMITTEE.

SUPREME COURT. Auckland. 1952. September 13 ; October 7. STANTON, J.

*Licensing—Licences—New Licence authorized by Licensing Control Commission in Certain Locality—Application to Licensing Committee for Such Licence—Powers of Licensing Committee in respect thereof—Grounds of Objection to Issue of New Licence to be considered—Appeal to Licensing Control Commission Proper Remedy for Committee's Refusal to grant New Licence—Licensing Act, 1908, ss. 91, 92, 103—Licensing Amendment Act, 1948, ss. 13, 49 (2), 50, 58, 64.*

A Licensing Committee has a discretion to grant or refuse a certificate for a new licence where the Licensing Control Commission has decided to authorize the granting of a new licence pursuant to s. 50 of the Licensing Amendment Act, 1948, and has issued a certificate under s. 51 of that statute authorizing the Licensing Committee in accordance with the principal Act and the Licensing Amendment Act, 1948, to receive and consider applications for such licence.

All provisions of ss. 91 and 92 of the Licensing Act, 1908, are applicable and must be taken into consideration by the Licensing Committee when receiving and considering applications for a licence authorized by the Licensing Control Commission, except that s. 91 (b) must be read subject to the provisions of the Licensing Amendment Act, 1948.

*Semble.* That the repeal of the concluding sentence of s. 103 of the Licensing Act, 1908, by s. 49 (2) of the Licensing Amendment Act, 1948, enlarged the discretion of a Licensing Committee.

If a Licensing Committee has refused an application for a new licence in such circumstances as to suggest that the Committee was attempting to defy or thwart the decision of the Licensing Control Commission, or was refusing to implement its fiat for the granting of a new licence, the proper remedy of an applicant is an appeal to the Commission.

ORIGINATING SUMMONS for the interpretation of certain sections in the Licensing Act, 1908, and the Licensing Amendment Act, 1948, in circumstances which may be shortly stated as follows :

The Licensing Control Commission established under the Licensing Amendment Act, 1948, had determined that there might be a new publican's licence for an hotel in the Borough of Te Puke, and had authorized the Tauranga Licensing Committee to hear and determine applications for such licence. The Committee gave the requisite public notice, and the Te Puke Borough Council applied for the licence. This application had been considered by the Committee, but had not been disposed of, and the opinion of the Court was sought as to the position and powers of the Committee. 5 10

The plaintiff was the licensee of the only hotel at present in Te Puke, and he had objected to the granting of the licence. At its meeting, at the close of the applicant's case the Chairman stated : 15

That he would direct the Committee as a matter of law that the Committee had no discretion to decide whether or not an additional licence should be granted in the Borough of Te Puke as such new licence had already been authorized by the Licensing Commission and that therefore the Committee must grant such licence to the only applicant provided the Committee was satisfied as to the character of the applicant. 20

The questions asked in the originating summons were as follows :

1. Whether upon the true construction of Sections 91 and 92 of the Licensing Act 1908 (hereinafter referred to as "the principal Act") and of Sections 49, 50 and 51 of the Licensing Amendment Act 1948 (hereinafter referred to as "the Amending Act") a Licensing Committee has a discretion to grant or refuse a certificate for a new licence where the Licensing Commission has decided to authorize 25

the granting of a new licence pursuant to Section 50 of the Amending Act and has issued a certificate under Section 51 of that Act authorizing the Licensing Committee in accordance with the principal Act and the Amending Act to receive and consider applications for such licence.

5 2. If the answer to Questions 1 is "yes", whether all of the provisions of Sections 91 and 92 of the principal Act or some only of such provisions (and if so which of them) are applicable and must be taken into consideration by the Licensing Committee when receiving and considering applications for a licence so authorized by the Licensing Commission.

10 Mr. Rosen appeared for the chairman of the Tauranga Licensing Committee, Mr. W. H. Freeman, S.M., and informed the Court that he would not submit argument.

*Cooney and Henry*, for the plaintiff.

*G. S. R. Meredith and Verschaffelt*, for the Te Puke Borough Council.

15

*Cur. adv. vult.*

STANTON, J. The provisions governing the granting of new or additional publican's licences are now contained in the Licensing Amendment Act, 1948. For present purposes, the procedure may be briefly described as follows: The Licensing Control Commission determine in what area  
20 a new licence is required, and it then authorizes the Committee of that area to call for applications for the licence and to hear and determine those applications. Apart from the special provisions relating to the fee to be paid for the new licence, the Committee is left to hear and determine these applications in the same way as it would hear and determine  
25 any other application for a publican's licence.

The provisions of ss. 91 and 92 of the Licensing Act, 1908, apply. All or any of the objections applicable under those sections can be made, and the Committee must hear them and must determine whether, in its view, the character of the applicant is satisfactory, whether the premises  
30 —actual or proposed—are suitable, and whether the proximity of a church, hospital, or school, or the disturbing effect of an hotel on the quiet of a place, or the absence of any requirement for an hotel in that neighbourhood militate against the granting of that particular application. Nowhere is it provided that these powers shall not be used to  
35 prevent the granting of *any* licence in, for example, the Borough of Te Puke, and provision has been made to ensure that any such action would not be effective by enacting that an appeal from the decision of a Committee refusing a licence may be taken to the Supreme Court if the refusal is on the ground of the applicant's character, and to the Licensing Control  
40 Commission if the refusal is on any other ground.

In other words, the Licensing Control Commission alone can authorize the issue of the additional licence, but the Committee has still to determine whether any particular application shall be acceded to and a licence granted to that applicant for the site and premises he submits; and, in  
45 so doing, the Committee must act under and in accordance with the provisions of ss. 91 and 92 of the Licensing Act, 1908. Section 103 provides that the Committee need not grant a licence merely because the requirements of the law as to accommodation or personal fitness of the applicant are fulfilled, and the repeal of the concluding sentence of this section  
50 would seem to have actually enlarged the discretion of the Committee.

In my view, if the Committee refused applications for a new licence in such circumstances as to suggest that the Committee was refusing to implement the fiat of the Licensing Control Commission for the granting

of a new licence, the proper remedy of an applicant would be, not to apply for a writ of certiorari to quash the refusal, or of mandamus to compel the grant of a licence, but to appeal to the Commission. The effect of this conclusion is not, as Mr. *Meredith* suggests, to render the enabling provisions of the Licensing Amendment Act, 1948, nugatory, but is only to indicate that the remedy for any attempt to defy or thwart the decision of the Licensing Control Commission is by way of appeal.

The answers to the questions asked are as follows :

1. Yes.

2. All the provisions of ss. 91 and 92 are applicable, except that s. 91 (b) must be read subject to the provisions of the Licensing Amendment Act, 1948.

I understand that it has been agreed that no costs shall be allowed to the plaintiff, but, as he has substantially succeeded, he should not be required to pay any costs to the Borough Council. In accordance with the practice approved in *Wi Kupe v. Acheson* ([1923] G.L.R. 10), the members of the Committee might well have left the matter to the Borough Council, and no costs are allowed to them.

*Questions answered accordingly.*

Solicitors for the plaintiff : *Cooney, Jamieson, and Lees* (Tauranga).

Solicitors for the Te Puke Borough Council : *Manning and Verschaffelt* (Te Puke).

### GARDINER v. HAWKE'S BAY LICENSING COMMITTEE

SUPREME COURT. Napier. 1953. February 12 ; 18. HAY, J.

*Licensing—Licence—Temporary Licence after Destruction of Hotel Premises by Fire—Such Licence superseding Former Licence and In Force pending Reinstatement of Premises on Hotel Site—Temporary Premises to be within Area of Local Authority issuing Licence—"Some neighbouring house"—Licensing Act, 1908, s. 138.*

The power conferred by s. 138 of the Licensing Act, 1908, upon the Chairman and two members of a Licensing Committee to "authorize such licensed publican temporarily to carry on his business in some neighbouring house" implies the power to issue in respect of such neighbouring house a temporary licence which supersedes the former licence, and which remains in force for such period or renewed period (not exceeding six months at any one time) as may be considered reasonable to enable the rebuilding or reinstatement of the premises to be carried out on the hotel site itself.

When licensed premises are rendered unfit for the carrying-on of business by reason of a fire, tempest, or other calamity, the area within which temporary premises may be sought under s. 138 of the Licensing Act, 1908, is necessarily confined to the local-authority district (whether a city, borough, town, or district) the officer of which issues the licence under the authority conferred by s. 98(4).

The word "neighbouring" as used in s. 138 of the Licensing Act, 1908, being a relative term, the true meaning of the term "some neighbouring house" in that section is to be ascertained only after considering the Licensing Act, 1908, as a whole, and by construing it with due regard to s. 127(4).

MOTION for the issue of a writ of mandamus commanding the defendants, the Chairman and members of the Hawke's Bay Licensing Committee, to issue a certificate authorizing the plaintiff to carry on business pursuant

to s. 138 of the Licensing Act, 1908, upon the grounds that the defendants, having jurisdiction to issue such a certificate, improperly refused to exercise jurisdiction.

5 The facts were not in dispute.

The plaintiff was the holder of a publican's licence in respect of the Railway Hotel, Otane, within the jurisdiction of the Hawke's Bay Licensing District, and the defendants were duly constituted the Licensing Committee for that district. On the night of January 2, 1953, the hotel premises had been completely destroyed by fire, with the exception of an outlying building formerly used as stables. On January 5, the plaintiff applied in writing to the Committee for authority to carry on business in temporary premises pursuant to the provisions of s. 138 of the Licensing Act, 1908. The application described the proposed temporary premises as a dwellinghouse (purchased by the applicant subsequent to the fire) situated at the corner of the Great North Road and the road leading down to the Otane township; and stated the intention of the applicant to build a temporary bar alongside and separate from the house. These premises, according to the Police report, were situated three-fifths of a mile west of the hotel site, and on the western side of the Napier-Woodville main highway, about 300 yards south of the Otane road junction. The Otane township, in which the hotel was situated, lies some distance east of the main road, and across the railway line. It is within the confines of the Patangata riding of the Patangata County, whereas the proposed temporary premises were in the Waipawa County, the boundary between the two counties in this locality being the main road. The township of Otane is not a borough within the meaning of the Licensing Act, 1908.

At some date subsequent to the lodging of the application with the Clerk of the Committee, a consent was endorsed thereon by two of the members of the Committee, and the application was then forwarded to the Chairman for his approval. Fearing that the grant of the application might involve the Committee in an excess of jurisdiction, in that it would purport to authorize the applicant to sell liquor in a different geographical (political) area from that in which he was formerly licensed to sell it, the Chairman, Mr. W. A. Harlow, S.M., quite properly invited the applicant's solicitor to make written submissions on the legal aspect of the matter. This was done on January 28, and, after consideration of the submissions, the Chairman on February 2 delivered a written judgment refusing the application on the ground of lack of jurisdiction to grant it, and setting out at length the reasons for his decision. Unfortunately for the plaintiff, he had in the meantime proceeded with the erection on his recently-acquired house property of a temporary bar on a somewhat comprehensive scale, and conforming in all respects with the requirements of the Police and Health Departments.

45 *Johanson*, for the plaintiff.

*Willis*, for the defendants.

*Cur. adv. vult.*

HAY, J. [after stating the facts, as above:] After hearing argument on the motion, and after full consideration of the matter, I have come to the conclusion that the Chairman of the Committee was right in his determination, and that neither the Committee, nor the Chairman and any two members thereof, have power under s. 138 to grant the authority sought.

Section 138 of the principal Act is in the following terms :

If the licensed premises of a licensed publican are rendered unfit for the carrying-on of his business by fire, tempest, or other calamity, the Chairman and any two members of the Licensing Committee, on the application by or on behalf of such licensed publican, may, if they see fit so to do, by order authorize such licensed publican temporarily to carry on his business in some neighbouring house (although not having the accommodation required by this Act) for any period not exceeding six calendar months, to allow of the rebuilding or repair of the premises so rendered unfit as aforesaid.

It seems to me beyond doubt that the power thereby conferred upon the Chairman and two members of the Committee to "authorize such licensed publican temporarily to carry on his business in some neighbouring house" necessarily implies the power to issue or to authorize the issue of a temporary licence in respect of such neighbouring house. Furthermore, on my view of the statute, the temporary licence granted under s. 138 must be deemed to supersede the former licence, and to remain in force for such period or renewed periods (not exceeding six months at any one time) as may be considered reasonable to enable the rebuilding or reinstatement of the premises to be carried out on the hotel site itself. Counsel for the plaintiff submits that the grant of an authority under s. 138 does not clothe the temporary premises with any form of temporary or permanent licence, and that the existing licence must be deemed to remain domiciled in the ruins of the hotel. That view of the statute seems to me untenable, even allowing for the fact that there is little in the statute expressly dealing with the issue of temporary licences : see in that connection s. 226 of the Licensing Act, 1908, and s. 58 of the Licensing Amendment Act, 1948, as amended by s. 11(6) of the Licensing Amendment Act, 1952. It is of the essence of a licence that there should be premises in which it is to operate, and, if the premises in respect of which it was granted cease for the time being to exist (excepting only as regards the land on which they stood) the licence itself must surely cease to have any effect in relation to those premises. When the premises are rebuilt, a new house comes into existence, and the true view of the law seems to be that the only application a Licensing Committee could then entertain would be an application for a new licence in respect of the new premises. I have not overlooked the provisions of s. 116 of the Licensing Act, 1908, to the effect that, where an application for the renewal of a licence has been made, and is not finally disposed of by the Committee on or before the day of the expiry of the licence by effluxion of time, the licence shall be deemed to be extended until the application is finally disposed of, but that provision does not appear to me to have any relevance in circumstances such as the present.

It would, moreover, give rise to somewhat startling results if an authority granted under s. 138 did not bring the "neighbouring house" within the category of licensed premises. It would mean that at least doubt would arise as to how far (if at all) the publican was bound by the provisions of ss. 74 and 189, proscribing the hours of sale and closing hours ; and by s. 181 and the following sections, creating such offences as permitting drunkenness, or violent or riotous conduct, keeping a disorderly house or permitting gambling on the licensed premises. Counsel for the plaintiff contends that, in considering the meaning and effect of s. 138, it is permissible to assume that the Legislature may well have had in mind that the licensee, for the purposes of that section, should be relieved not only from the requirements as to accommodation but from the other obligations of the Act. He bases that contention in the view that the section contemplates a benefit to the holder of a

licence for a limited period only, and should receive such fair, large, and liberal construction as the circumstances warrant. Whilst that may be true, it is a governing principle of construction of a statute that every separate provision should be construed with reference to its context and the provisions of the Act generally, so as to arrive at the true meaning of the provision in question in the light of the aim, scope, and object of the Act. The benefit conferred by s. 138 on the holder of a licence should not be allowed to obscure the fact that there are other interests to be considered, both of a public and private nature, and that consideration is peculiarly applicable in matters arising under this particular legislation. It seems to me, therefore, that it would be opposed to true principles of construction to treat s. 138 as an independent provision, to be construed on its language alone uninfluenced by the scheme and purpose of the Act.

If I am correct in my view that the power expressed in s. 138 necessarily implies the power to issue or to authorize the issue of a temporary licence, it seems to follow that the granting of the plaintiff's application would amount to a determination to remove the licence (albeit temporarily) beyond the boundary of the Patangata riding of the Patangata County, in breach of the express provisions of s. 127(4) of the Licensing Act, 1908. The plaintiff's application, though not in terms one for the removal of his licence, and though obviously not intended as such, has, in my opinion, the practical effect of an application for removal without complying with the requirements of s. 127. That section, it may be noted, provides that objections to the removal of any licence may be made in manner provided by the Act in respect to objections to the granting of licences. Even assuming that view not to be justified, it is at least clear in my opinion that the power conferred by s. 138 cannot be exercised without regard to the policy of the Legislature as disclosed by the Act generally, and, in particular, by the provisions of s. 127(4). The licence in the present instance was issued in respect of premises situated at Otane, which is within the Patangata riding of the Patangata County, and the whole situation is governed by that consideration. It follows that, when the licensed premises are rendered unfit for the carrying on of business by reason of a calamity of the nature referred to in s. 138, the area within which temporary premises may be sought under that section is necessarily confined to the local authority district (whether a city, borough, town or district) the officer of which issues the licence under the authority conferred by s. 98(6).

That, in my view, is a qualification which, as a matter of interpretation, must be placed upon the meaning of the expression "some neighbouring house" in s. 138. In that connection, I cannot do better than adopt the language used by the Chairman, when he said in effect that "neighbouring" being a relative term, the true meaning of the expression in s. 138 is to be ascertained only after considering the Act as a whole, and by construing it with due regard to s. 127(4).

For the reasons given, the motion for mandamus will be dismissed, with costs £7 7s. and disbursements to defendants.

*Motion dismissed.*

Solicitors for the plaintiff: *Johanson and Grant* (Waipawa).

Solicitor for the defendants: *Crown Solicitor* (Napier).

[IN THE SUPREME COURT AND COURT OF APPEAL.]

MANAWATU-OROUA RIVER BOARD *v.* BARBER.

SUPREME COURT. Palmerston North. 1952. August 26, 27, 29 :  
October 15. FAIR, J.

COURT OF APPEAL. Wellington. 1953. March 18, 19. 24 ; June 26.  
STANTON, J. ; HAY, J. ; NORTH, J.

*Public Works—Compensation—Claim for Compensation for Damage to Land by Public Work—Time-limitation for bringing Claim not applicable when Relationship between Two Portions of Public Work such that Damage not ascertainable until Whole Work completed—“In itself (and without any reference to any other part of the work) causes the damage” —Public Works Act, 1928, s. 45—Statutes Amendment Act, 1939, s. 63.*

*Land Valuation—Land Valuation Court—Jurisdiction—Claim for Compensation for Damage to Land as Result of River Board's Diversion Operations—Limitation of Time for Commencement of Action—Such Question a Matter Preliminary to or Collateral with Merits—Jurisdictional Fact—Court's Decision thereon reviewable by Supreme Court—Public Works Act, 1928, s. 45.*

The respondent lodged a claim for compensation under the Public Works Act, 1928, against the appellant Board in respect of damage alleged to have been caused to the respondent's property as the result of a public work undertaken by the appellant Board. This claim was heard by a Land Valuation Committee, which awarded the respondent £1,234. An appeal from that determination was taken to the Land Valuation Court, which held that the claim was out of time and that it had no jurisdiction to consider the claim : *Ante*, p. 139, where the facts are fully set out. The respondent then commenced proceedings for certiorari and mandamus in the Supreme Court, contending that the Land Valuation Court had wrongly decided the question of the time-limit, that its decision thereon was subject to review by the Supreme Court, and should be quashed ; and that the Land Valuation Court should be directed to hear the claim for compensation on its merits. *Fair, J.*, upheld this contention and directed that the decision of the Land Valuation Court should be quashed, and that the claim for compensation should be heard and determined by it. From that decision, the Board appealed.

Counsel were agreed that, under s. 17 of the Land Valuation Court Act, 1948, the Land Valuation Court in dealing with claims for compensation has a status somewhat different from that of a Compensation Court under the Public Works Act, 1928 ; and its award or order can be reviewed in the Supreme Court on the ground of lack of jurisdiction only. Counsel confined themselves to contending that the Land Valuation Court's decision was or was not made without jurisdiction.

*Held*, 1. That the question of time-limitation under s. 45 of the Public Works Act, 1928, was jurisdictional as it was a matter preliminary to or collateral with the merits—in this case, to the occurrence and extent of the alleged damage ; and that a decision by the Land Valuation Court on such a preliminary or collateral matter can be examined and reviewed by the Supreme Court, and, if considered wrong by it, corrected.

*R. v. Shoreditch Assessment Committee* ([1910] 2 K.B. 859) ; *Osborn and Clark v. Auckland City Corporation* ([1935] N.Z.L.R. 1 ; [1935] G.L.R. 126) applied.

*Sullivan v. Mayor, &c., of Masterton* (1909) 28 N.Z.L.R. 921 ; 12 G.L.R. 136) and *O'Brien v. Chapman* (1910) 29 N.Z.L.R. 1053) referred to.

2. That, even if the question of time-limit under s. 45 of the Public Works Act, 1928, for the commencement of proceedings were not strictly a preliminary point, the jurisdiction depended upon a particular fact which was collateral to the actual matter which the Land Valuation Court had to try ; and, in the

present case, the determination of the Land Valuation Court was reviewable on matters both of fact and law.

*R. v. Blakeley* ((1950) 82 C.L.R. 55) applied.

3. That the Supreme Court will not disregard the Land Valuation Court's findings of fact unless they are clearly shown to be erroneous, except where that Court is dealing with matters of causation in relation only to the time for the commencement of proceedings, and it is the duty of the Supreme Court to examine the Land Valuation Court's findings and to determine as best it can whether it finds them justified.

*Stratford Borough v. Wilkinson* ([1951] N.Z.L.G.R. 67; followed.

4. That, considering the enactment of s. 45(2) of the Public Works Act, 1928, in the light of its history, the Legislature did not intend to bar claims arising from the execution of a public work until it was, or should have been, manifest to the claimant that his claim was ripe for determination; and that subsection has no application if the relationship between the first portion of a public work and the second portion is such that the final damage cannot be ascertained until the whole work is completed.

5. That the appellant Board had by its course of conduct linked all its river-diversion operations together in such a close association that it was impossible for it to say, or for a Court to hold, that the damage caused was other than damage from the execution of the works as a whole.

6. That, on the undisputed facts, the final fate of the appellant Board's scheme of river-diversion was uncertain, but, whether it had been abandoned in the form in which the appellant Board was attempting to carry it out, or whether it was only being postponed or modified, it was in either case an uncompleted work, which, regarded as a whole, had damaged the respondent's property, and his claim for that damage was not out of time, and his claim must be considered and determined by the Land Valuation Court.

Appeal from the judgment of *Fair, J.*, (*Infra*) dismissed.

APPLICATION for a writ of certiorari addressed to the defendants removing into the Supreme Court the judgment of the Land Valuation Court affecting an award of compensation given by the Land Valuation Committee to the plaintiff, and for a writ of mandamus requiring such Court to hear and determine the plaintiff's claim for compensation under the Public Works Act, 1928, upon the merits.

The facts and the circumstances under which the application was made were set out in what Mr. Justice Fair termed the detailed and careful judgments of the Land Valuation Committee and the Land Valuation Court *Ante*, p. 139.

*G. I. McGregor* and *Bergin*, for the plaintiff.

*Yorlt*, for the second defendant.

*Cur. adv. vult.*

FAIR, J. The first question that arises is whether this Court has any power to make such orders as those asked for. The Land Valuation Court Act, 1948, s. 17, provides as follows:

Proceedings before the Court shall not be held bad for want of form. Subject to the provisions of subsection three of section thirteen of this Act no appeal shall lie from any award or order of the Court, and except on the ground of lack of jurisdiction no proceeding, award, or order as aforesaid shall be liable to be challenged, reviewed, quashed, or called in question in any Court.

The plaintiff contends that the Land Valuation Court held that it had no jurisdiction to determine the questions arising under the appeal, as the claim for compensation was out of time, having been made more than twelve months from the date at which the portion of the work causing the damage for which compensation was claimed was completed. It held that



neither it nor the Land Valuation Committee had any jurisdiction to entertain the claim or give any rulings in respect of it.

The phrase "lack of jurisdiction" *prima facie* applies to an application to restrain a Court from exercising its jurisdiction in respect of a matter as to which the law has not given it jurisdiction. But Mr. Yortt agrees—and I think quite properly—that it also extends to cover a case where a Court has held that it has no power or jurisdiction to hear and determine a matter which the law says it can and should decide.

I had occasion to consider a similar phrase in *Bethune v. Bydder* ([1938] N.Z.L.R. 1; [1937] G.L.R. 665). I was there considering s. 20 of the Fair Rents Act, 1936, which provides as follows:

No appeal shall lie from any decision, determination, or order made under the provisions of this Act; and, except upon the ground of lack of jurisdiction, no such decision, determination, or order shall be liable to be challenged, reviewed, quashed, or called in question in any Court.

I said: "The exception from the section where there is a lack of jurisdiction must mean where the conditions required to make the provisions of the Act applicable to the questions arising are absent. Whether or not such conditions exist is a matter which goes to the very foundation of the question whether the special jurisdiction conferred by the Act—*e.g.*, in regard to rentals—exists, and also of the question whether the power and duty to exercise the general jurisdiction under the Magistrates' Courts Act, or other authority, as to making an order for possession, is taken away. In the one case, the jurisdiction is extended; in the other case, it is restricted by the Fair Rents Act. If the jurisdiction is extended by the Court beyond the area covered by the Act, plainly the Court acts without jurisdiction. So, too, if a Court refuses to exercise its general jurisdiction in mistaken reliance on the provisions of the Act it similarly lacks jurisdiction to restrict its power in this way. The language is, I think, although, perhaps, not very happily chosen, wide enough to cover both situations—*i.e.*, a positive assertion of jurisdiction without warrant; and a decision that the Court has a power or duty by reason of the provisions of the Act to decline to exercise jurisdiction which a party would otherwise be entitled to invoke" (*ibid.*, 30, 31; 683).

The question then requiring to be decided is whether the decision that a compensation claim of this kind is out of time is a decision in respect of a matter collateral to the issues which the Land Valuation Court has to decide, or whether it is one of those very matters itself. The distinction is at times fine, and, in most cases, is difficult to define. The question is touched upon in *9 Halsbury's Laws of England*, 2nd Ed. 766, para. 1298, where it is said:

If an inferior tribunal on the hearing of a preliminary objection comes, on the evidence before it, to a conclusion of fact which justifies such objection, and in consequence dismisses a matter brought before it, no mandamus will lie commanding that tribunal to hear and determine the matter, but it is otherwise if the objection turns upon a question of law.

A similar question with reference to the question of granting prohibition against the exercise of a jurisdiction that does not exist is dealt with in para. 1399, and a useful collection of the leading authorities is to be found in note (g). But the most direct passage applicable to the present case is to be found in para. 1485, where it is said:

The case is more difficult where the jurisdiction of the Court below depends, not upon some preliminary proceeding, but upon the existence of some particular fact. If the fact be collateral to the actual matter which the lower Court has to try, that Court cannot, by a wrong decision with regard to it, give itself jurisdiction which it

would not otherwise possess. The lower Court must, indeed, decide as to the collateral fact, in the first instance; but the superior Court may upon certiorari inquire into the correctness of the decision, and may quash the proceedings in the lower Court if such decision is erroneous, or at any rate if there is no evidence to support it.

5 On the other hand, if the fact in question be not collateral, but a part of the very issue which the lower Court has to inquire into, certiorari will not be granted, although the lower Court may have arrived at an erroneous conclusion with regard to it.

These questions have been the subject of a great number of decisions, and some of the earlier cases are difficult to reconcile with the later cases, but the latest authorities seem to confirm the last cited passage as set out in *Halsbury*, with, perhaps, the elimination of the words "or at any rate" if there is no evidence to support it". The latest decision which undertook a comprehensive review of the general principles applicable is

15 *R. v. Blakeley* (1950) 82 C.L.R. 55, where the matter is discussed at length, particularly by *Sir John Latham*, C.J., and *Fullagar*, J. In the passages contained in the compendious judgment of the latter (*ibid.*, 90-93), he relies, as the learned Chief Justice's and many other judgments rely, on the decision of *Coleridge*, J., in *Bunbury v. Fuller* (1853) 9 Ex. 111;

20 156 E.R. 47, where he said: "Suppose a Judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; on its being presented, the Judge must not immediately forbear to

25 "proceed, but must enquire into its truth or falsehood, and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forbore or proceeded on the main matter in consequence of an error, on this the Court of Queen's

30 "Bench will issue its mandamus or prohibition to correct his mistake" (*ibid.*, 140; 60). In *Blakeley's* case (1950) 82 C.L.R. 55, *Sir John Latham*, C.J., says: "If an authority with limited jurisdiction has no power to make a conclusive decision as to the existence or non-existence of a collateral matter upon which jurisdiction depends, and makes a

35 "wrong preliminary decision either way, the mistake will be corrected by mandamus or prohibition—by mandamus if he wrongly decides that he has no jurisdiction, by prohibition if he wrongly decides that he has jurisdiction. In the present case the Commissioner has in my opinion erroneously decided that there are no disputes existing between the

40 "Association and its members on the one hand and the employers who were served with the log on the other. He has wrongly declined to exercise his power and to perform his duty of hearing and determining the disputes. Therefore, in my opinion, mandamus should issue" (*ibid.*, 75).

45 *Blakeley's* case (1950) 82 C.L.R. 55) seems also in conformity with the decision of our own Court of Appeal in *Bethune v. Bydder* ([1938] N.Z.L.R. 1; [1937] G.L.R. 665) in which it was held that the Supreme Court could review the decision of a Magistrates' Court on the question of fact and law as to whether a building was a dwelling.

50 Reference may also be made to the decision of the Privy Council in *R. v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128), where it was said with regard to the control of superior Courts over Courts of limited jurisdiction: "Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has

55 "been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision,

"not of review, is confined. That supervision goes to two points : one is "the area of the inferior jurisdiction and the qualifications and conditions "of its exercise ; the other is the observance of the law in the course of "its exercise " (*ibid.*, 156).

It is to be noted, too, that a similar question of the time within which a claim for compensation should be brought was held by *Cooper, J.*, in *Sullivan v. Mayor, &c., of Masterton* (1909) 28 N.Z.L.R. 921 ; 12 G.L.R. 136) in respect of a somewhat similar Act, to be a question collateral to the merits ; and he restrained the Compensation Court from exercising jurisdiction where he held the claim was out of time.

The decision of the Court of Appeal in *McKellar v. Land Board of Otago* (1908) 27 N.Z.L.R. 811 ; 10 G.L.R. 433) was a decision in respect of a very different Act, which contained a provision :

The decision of the Board on all matters to be by it heard and determined shall, subject to the provisions of this Act relating to Land Board appeals, be final and conclusive.

*Williams, J.*, held that the Board had not so construed the section as to give it jurisdiction when it had no such power. It is true that *Edwards, J.*, dealt with the general question, and relied on the decision of the Court of Appeal in *In re Roche* (1888) 7 N.Z.L.R. 206). *In re Roche* was a case where it was held that the question whether a female applicant for a publican's licence possessed the preliminary status of being an unmarried woman was not a preliminary question, but was part of the merits of the case. So far as *McKellar's* case is concerned, it cannot be considered a direct authority except upon the very question which it decided. So far as *Roche's* case is concerned, although it finds support from some earlier English cases, there has been a tendency to modify it, if not to overrule it, in later cases. The most striking example of this is the decision of *Viscount Caldecote, L.C.J.*, in *R. v. Weston-super-Mare Justices, Ex parte Barkers (Contractors), Ltd.* ([1944] 1 All E.R. 747). There, considering the question as to what is a collateral matter, he said, referring to *R. v. Bradford* ([1908] 1 K.B. 365) : "In that case it was held that the question whether land was not a park was preliminary to the exercise of the jurisdiction given to the Magistrates, and an order of certiorari was granted in that case to quash the decision of the Magistrates. It may seem rather a fine distinction, but I think there is a distinction between a jurisdiction which is in fact limited as in that case by certain requirements, and a case in which a person of a particular description or having a particular capacity or status is fixed with responsibility for doing or not doing a particular thing. In such a case it is part of the issues which the Magistrates have to decide when the information is brought against a person said to be acting in that capacity or having that status " ([1944] 1 All E.R. 747, 750). *Atkinson and Oliver, JJ.*, agreed.

Since that time, too, the Courts seem to have indicated an inclination to bring questions of personal qualifications into the area of collateral questions where jurisdiction depends on their decision. One of the latest cases is *R. v. Manchester Legal Aid Committee, Ex parte R. A. Brand and Co., Ltd.* ([1952] 1 All E.R. 480). See also *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* ([1951] 1 K.B. 711 ; [1951] 1 All E.R. 268). In that case, *Lord Goddard, L.C.J.*, said : "The tribunal has told us what they have taken into account, what they have disregarded, and the contentions which they accepted. They have told us their view of the law, and for the reasons which I gave at the beginning of my judgment this Court is of opinion that the construction which they placed on this very complicated set of regula-

"tions was wrong" (*ibid.*, 717; 277). The Court there quashed the decision of a Compensation Appeal Tribunal determining the position and rights of a local body officer to compensation, on the ground that the Court had jurisdiction to set it aside as being erroneous in law.

- 5 It is to be noted, too, that none of these cases was a case in which the statute under which the Court of limited jurisdiction was acting expressly contemplated supervision for lack of jurisdiction, as s. 17 does in this Act. It is, of course, perfectly clear that this sort of proceeding is not to be substituted for an appeal, and that what the Court has to inquire into, as was
- 10 said in *Blakeley's case* ( (1950) 82 C.L.R. 55) is the preliminary question whether the Court has jurisdiction. Any other matters arising in connection with a claim are entrusted, as to both law and fact, to the final decision of the Land Valuation Court, subject to its power to reserve questions for the Court of Appeal if it so wishes. The authorities also
- 15 establish that the supervising Court will not interfere where the jurisdiction depends on questions of fact, except where the facts are clear to establish jurisdiction, but that evidence may be adduced to make them demonstrably clear if that is possible. So far as errors in law are concerned, the superior Court must act upon its own view of the law as the
- 20 final authority to decide this matter, subject to the Court of Appeal and Privy Council. Where there is a mixed question of law and of fact, the question is more difficult. Before passing from this aspect, reference may be made to the passage in *Colonial Bank of Australasia v. Willan* ( (1874) L.R. 5 P.C. 417, 444), where the passage from *Bunbury v. Fuller*
- 25 ( (1853) 9 Ex. 111, 140; 156 E.R. 47, 60) is again invoked.

The Court therefore holds that it has power to inquire into the question whether the Land Valuation Court erroneously decided that the claim was out of time, and therefore wrongly declined jurisdiction in respect of the claim.

- 30 The interpretation of s. 45(2) of the Public Works Act, 1928, in its application to the claim for compensation under consideration in the present case is one of difficulty. This would appear from the terms of the very careful and full examination of the problem that has been set out in the judgments of both the Land Valuation Committee and the Land
- 35 Valuation Court. It would also appear from the decision in *O'Brien v. Chapman* ( (1910) 29 N.Z.L.R. 1053; 126 L.R. 744). In that case, it was held that the words "execution of the works" in respect of the erection of a railway embankment, that caused the whole of the damage complained of, referred to that section of the railway of which the embankment was
- 40 part which would be open for working as one section. It did not refer to the whole of the contemplated work. It did not refer to the embankment itself. It referred to the embankment as part of an engineering and business construction that could be operated as a unit. *Chapman, J.*, in the Compensation Court had thought that the execution of the work
- 45 was completed when the embankment had been finished. It will be seen that the decision in respect of this question was based upon practical considerations in relation to a reasonable interpretation of the phrase in its application to the circumstances of the work concerned.

- 50 Subsequent to the decision of that case, s. 45(2) was enacted as s. 13 of the Public Works Amendment Act, 1910, with the intention obviously of making the claim date from the completion of that portion of the contemplated work which actually caused the damage. But an examination shows the subsection to be phrased in language to ensure a practical and reasonable standard for determining the time of completion.

- 55 In the present case, there has been a difference of opinion between the

Land Valuation Committee and the Land Valuation Court as to what constituted the work in the present case. So far as that is concerned, without going into the matter in great detail, I think it desirable to say that the original cutting in 1930 must be regarded as having been completed many years ago. So far as the work undertaken to reopen No. 1 cutting in 1940 is concerned, that, I think, cannot be considered as linked up with No. 2 cutting from that date, unless there is evidence that the Board had definitely decided to regard it as one work, or the practical engineering requirements in respect of a reasonable reopening of No. 1 cutting so demanded. Neither of these conditions seems to be satisfied upon the facts as found by the Land Valuation Court, or upon the evidence put before me.

The construction of No. 1 cutting in 1940 and the subsequent years is not, I think, to be confined to the work actually done on the land or the bed of the river physically adjoining that cutting. That work can, I think, be regarded as completed only when it has been carried out in the way in which it was intended to be carried out, and might reasonably have been required to be completed from an ordinary reasonable and practical engineering standpoint.

It seems inconceivable that any responsible body such as the second defendants would intend to carry out a work in a way that would result in the infliction of serious damage unless some obviously necessary additional work in connection with it was carried out. It would be a gross breach of duty on the part of any public body recklessly to contemplate or allow work to be carried out in such a way when it was within their means to prevent it. It must be inferred, therefore, that it was intended to take such necessary steps in connection with the reopening of No. 1 cut as would minimize the damage resulting without affecting its beneficial effect. The evidence shows that this involved at least the making of groynes and stop-banks on other parts of the banks of the river. Unfortunately, the attention of the Land Valuation Court seems to have been directed more towards whether the reopening of No. 2 cut was part of the work of No. 1 cut, and this other question does not seem to have been put clearly or emphatically before it.

Section 45 is a provision *sui generis*, and in its interpretation little assistance can be obtained from decided cases, except on broad grounds. Such is found, in my view, in *O'Brien's case* (1910) 29 N.Z.L.R. 1053; 12 G.L.R. 744 and *Sullivan's* (1909) 28 N.Z.L.R. 921; 12 G.L.R. 136. Some assistance may also be gained by the definition of the word "works" in s. 12(1) of the Highways and Locomotives Act, 1898 (repealed) (Eng.), in *Carlisle Rural District Council v. Carlisle Corporation* ([1909] 1 K.B. 471). That concerned the commencement of the running of six months within which an action for recovery of expenses might be brought by the appellant. The choice there was between the actual work causing the damage and the completion of the whole work in respect of which that work was being done. The words to be construed were:

Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work.

It was held that the completion of the contract or work did not mean completion so far as the contractual obligations between the parties were concerned, but meant what in the course of this argument has been called the "constructional" completion of the work. Lord Cozens-Hardy, M.R., said: "In my view the very object and intent of this section was

- “to provide that in the case of a building contract the local authority  
“are not to be forced to bring as many separate actions, it may be, as  
“they have roads, but are entitled to wait until they see that the whole  
“building contract is completed as far as constructional purposes are  
5 “concerned, and that this is the date at which the period of six months  
“within which they must take proceedings begins to run . . . The  
“view of the learned Judge seems to have been that you must ascertain  
“whether the haulage in any particular road ceased more than twelve  
“months, or in the case of a building contract six months, before the  
10 “action was brought, and whether there is any reasonable probability  
“of any further extraordinary traffic being conducted over that road  
“ . . . the crucial date to be considered is not the date when the  
“haulage caused damage to a particular road, but the date when that  
“particular building contract was completed so far as construction was  
15 “concerned, and then, and then only, the local authority may sum up  
“all their claims in one action” (*ibid.*, 480, 481). *Fletcher Moulton, L.J.*,  
said: “It is not an unimportant fact that every operation of that work  
“was contained in one contract, but what is more important to my mind  
“is that the various portions of the work are so closely connected that  
20 “they would naturally be contained in one and the same contract, though  
“of course they would not necessarily be so. Under those circumstances  
“I have no hesitation in deciding on the facts of this case that those  
“constructions formed one work . . . ‘Work’ used in s. 12 is the  
“construction for which these operations are undertaken; it is not the  
25 “operations themselves. If we were to decide otherwise we should say  
“that there was an obligation of provision on the local authority whereby  
“they were to anticipate whether future portions of the work, that is to  
“say, the construction, would be executed by methods which would do  
“damage to their roads or would not. The Act, in my opinion, lays no  
30 “such unreasonable burden upon them. As long as the work, which is  
“the construction, is unfinished they may wait; but when it has been  
“finished and they can calculate the whole of their damage they are  
“bound not to wait longer than the statutory time before they bring  
“their action” (*ibid.*, 481, 482, 483). *Buckley, L.J.*, said: “The two  
35 “works A and B may be not two separate contracts on one piece of paper,  
“but component parts of one complete contract . . . The laying of  
“the intake pipe, the construction of the reservoir, and the laying of the  
“outflow pipe are, it is said, separate works. In a sense they are, but  
“not for the purpose with which we have here to do. They are one  
40 “work, one composite work, consisting of three parts, each of which is  
“essential for the use, purpose, and existence of the other . . . But  
“the case with which we have here to do is that A has not and B has not  
“been so completed as that this particular district will not or may not  
“be affected by extraordinary traffic arising from the contract . . .  
45 “so long as the further constructional completion of the contract or work  
“will or may create further extraordinary traffic or damage or expense  
“within the district I think the district authority is not bound to bring  
“its action, but is entitled to wait until the authority which is executing  
“the contract has completed the work . . . The intention is that the  
50 “whole of the injury to the roads occasioned by the building . . .  
“shall be the subject of one action to be brought within six months of the  
“time when the building contract or work shall have been completed”  
(*ibid.*, 483, 484, 485). Similarly in s. 45(2) I think the words “portion  
“of a work” are not to be strictly and rigidly construed or defined with  
55 reference to the specific contract entered into for the particular work, or

even the works definitely authorized by the local body to be carried out, or those intended at the time of its commencement to be carried out. Mr. *McGregor* is, I think, right in considering that the Court should attach considerable weight to the provision in s. 42 that persons injuriously affected by the work are to be entitled to *full* compensation for their damage. It could not have been intended that any limitation of period should be imposed that would either lead in a great number of cases to unnecessary difficulty in assessing the amount of compensation justly due, or require more than one claim in respect of what was actually in fact the same piece of work or construction. It would seem that a work, or a portion of a work, should be considered as comprehending everything done in connection with that work which from a practical commonsense or engineering point of view would be considered either essential or so strongly desirable in the execution of it from an efficient and business-like method of construction that it should be regarded as ordinarily and normally a part or feature of the work actually done. If the actual finishing off of the work is delayed for some time, then it can reasonably be said that the work was not completed until it was done. That it was not previously authorized, intended, contemplated, or foreseen should not, I think, be considered as preventing it from being regarded as part of that portion of the work.

That view seems to be affirmed by the concluding portion of subs. 2 of s. 45 of the Public Works Act, 1928, which expressly contemplates such a situation. It says :

such portion of the work shall be deemed to be completed when anything further that may be required to be done thereon to finish the same will have no effect either to increase or lessen the damage.

This plainly indicates that the various component factors arising out of the public work being constructed have, as one might reasonably expect should be the case, to be considered in relation to the right of compensation given. It also, no doubt, has in view preventing multiplicity of claims. As soon as the portion of the work is completed in such a way that thereafter nothing is intended or reasonably necessary to be done to it that can increase or lessen the damage, it is completed. To accept as a definition of a "work" the engineer's specifications at the time of the commencement or the work for which funds have been provided or which has been authorized or intended as the work or portion of the work would, I think, be adopting an academic test rather than the practical one that the subsection contemplated. I realize that against this it may be argued that, if there remained something to be done, some small matter to be completed which remained incomplete for a long time, that might correspondingly extend the time for making a claim. It may be said that it would also give ground for argument as to the time at which the period should commence to run. But these difficulties seem to be met by the fact that the time must start to run from the period when everything substantially necessary to complete the portion of the work in an ordinary engineering or practical business-like way has been done. It need not be done in the best way. Not everything need be done that might be done to make it most efficient. But as long as something substantial remains to be done that any competent engineer would say was necessary to complete it from the point of ordinary engineering efficiency, and that might lessen or increase the damage, then it may be considered as incomplete, whether that failure is due to lack of prevision, finance, or skill.

The deepening of No. 2 Cut, and the construction of groynes to lead into No. 2 water coming out of No. 1 Cut, were part of the original work in



1940 consequential upon No. 1 cut. But all attempts to achieve this were abandoned in 1948. Thereafter, rock-protection work was done lower down, in an attempt to protect the plaintiff's land from the increased erosion owing to the diversion of the water through No. 1 cut.

- 5 Mr. Farquhar, the Board's engineer, said: "As an engineer, I couldn't leave the matter at developing No. 1."

- In the present case, it would appear that the works in the way of rock-protection work lower down that were completed in May, 1950, may fairly be regarded as a portion of the work of deepening No. 1 cut, and as part of the same work—namely, the protecting of the banks opposite and perhaps lower down against the result of the greater flow of water projected on them from a different point upstream. Such works are not really independent of the deepening of No. 1 cut; they are due entirely to the success of that cut. They are necessary from a practical engineering point of view and from the point of view of efficiency. They are connected with, and in fact interwoven with, the construction of that, and they may, I think, as I have said, fairly be regarded as part of it. They are not independent in any real sense.

- It will appear, therefore, that, with the greatest respect for the learned Judge of the Land Valuation Court, I think that, by limiting the word "thereon" to work done on the actual physical ground connected with No. 1 cut, or directly contemplated as part of it when the major work was being done, he construed the subsection too strictly and that it should extend to work done which springs as a direct engineering necessity from the physical work done on the cut, and which would be regarded by any competent engineer as an essential part of the engineering scheme and works to be carried out in the event of that deepening being successful. This is so, I think, at least where such necessary consequential work is actually carried out later.

- 30 It is unnecessary for me to deal with the other grounds that Mr. McGregor adverted to—namely, that there were some small matters in connection with the construction of groynes lower down the river in respect of which compensation is claimed and which, he submitted, were entirely independent of the major claim.

- 35 For these reasons, I consider that the Land Valuation Court had jurisdiction to hear and determine this claim for compensation, and that a mandamus should be issued to it requiring it to hear and determine the claim. If a formal order in the terms of the Court's judgment has been sealed, then it should be removed by certiorari in order that it may be quashed, and thus enable the Land Valuation Court to proceed with the hearing. I understood the parties to undertake that such a formal order would be drawn up. If this has not already been done, it should be done and the formal order of certiorari sealed to remove it into this Court and quashing it.

- 45 The plaintiff is entitled to costs of this application, which will be fixed at sixty guineas and disbursements.

From the whole of the foregoing judgment, the defendant Board appealed on the ground that such decision was erroneous in point of law and matter of fact.

- 50 In the Court of Appeal,

*Cleary and Yortt*, for the appellant Board.

*G. I. McGregor and Bergin*, for the first respondent.



*Cleary*, for the appellant Board. A distinction is to be drawn between the power to quash the judgment of an inferior tribunal by reason of absence of jurisdiction, and the power to quash by reason of error of law on the face of the record or proceedings. A superior Court has, and always has had, power to quash the proceedings of an inferior Court because of error on the face of the record: see *R. v. Northumberland Compensation Appeal Tribunal* ([1951] 1 K.B. 711; [1951] 1 All E.R. 268; aff. on app. [1952] 1 All E.R. 122), but the Divisional Court and the Court of Appeal declined to follow a previous decision of the Court of Appeal (*Racecourse Betting Control Board v. Secretary of State for Air*, [1944] 1 All E.R. 60) where a Court of Appeal had overlooked that it had power to quash by reason of an error of law on the face of the proceedings). The Court of Appeal in 1944 had apparently been led into this error because two cases to the contrary—one a decision of the House of Lords and another of the Privy Council—had not been cited to it; but the judgment of Lord Goddard, L.C.J., in *R. v. Northumberland Compensation Appeal Tribunal* ([1951] 1 K.B. 711, 717-721; [1951] 1 All E.R. 268, 277 was fully approved: see ([1952] 1 All E.R. 122, 124, 125, 133).

There are two main differences where jurisdiction is exercised and certiorari is granted on the ground of absence of jurisdiction from where it is exercised because of error on the face of the proceedings: (a) in the former case, evidence extrinsic to the record is admissible, but, in the latter case, it is not admissible: that is made clear in a passage in the judgment of Lord Goddard, L.C.J., in *R. v. Northumberland Compensation Appeal Tribunal* ([1951] 1 K.B. 711, 719; [1951] 1 All E.R. 268, 277) applying *R. v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128, 151-159).

(b) Where certiorari has been taken away by statute, the superior Court can quash only where the inferior tribunal has exceeded its jurisdiction. The only thing examinable is whether the inferior tribunal has clothed itself with jurisdiction which the statute has not given it: 30 *Colonial Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 417, 442; as, for example, in New Zealand, in *New Zealand Waterside Workers' Federation Industrial Association of Workers v. Frazer* ([1924] N.Z.L.R. 689; [1924] G.L.R. 139) and, in Australia, *R. v. Blakeley* ([1950] 82 C.L.R. 55). The position is that, although an inferior tribunal such as the Land Valuation Court, in respect of whose order certiorari has been taken away by statute, is the sole judge of all matters both of fact and of law, within its jurisdiction, and, no matter how it may appear to have erred, either as to the facts or as to the law, its orders or judgments are not examinable. But it is not the final judge as to the limits of its jurisdiction: its findings on matters which affect its jurisdiction are examinable. The powers of the superior Court in its regard are powers of superintendence, not powers of review. This leads to the crucial question: what is the distinction between a decision by a tribunal as to its jurisdiction and a decision by such a tribunal within its jurisdiction? 45

In some cases the matter may be clear, as where the tribunal has purported to exercise jurisdiction over subject-matter not entrusted to it; but that class of case is exceptional. The cases where difficulties arise are where a tribunal has to adjudicate in the course of its inquiry on some subject-matter not entrusted to it. In *Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 417, 442, 443), there is a classification of the cases that arise. The present case comes within the fourth class there mentioned. The principle to be applied to cases falling within that fourth class is usually expressed by saying that a tribunal of limited jurisdiction cannot give itself jurisdiction by a wrong decision on a point collateral to the 55

merits of the case entrusted to it : 9 *Halsbury's Laws of England*, 2nd Ed. 881, para. 1485 ; *In re Roche* (1888) 7 N.Z.L.R. 206, 219 ; *McKellar v. Land Board of Otago* ((1908) 27 N.Z.L.R. 811, 823, 825 ; 10 G.L.R. 433, 442, 445) which is referred to in *Willan's* case ((1874) L.R. 5 P.C. 417, 444) ; *Bethune v. Bydder* ([1938] N.Z.L.R. 1, 9, 16-18, 33, 35 ; [1937] G.L.R. 665, 671, 675, 685, 686). So that the question here is whether the determination of the Land Valuation Court as to when the work was executed is a determination on a collateral matter going to its jurisdiction, or whether it is a determination in the course of its jurisdiction. In the former event, the determination would be examinable ; in the latter event, it would not : *In re Roche* (1888) 7 N.Z.L.R. 206, 209, 220 ; *McKellar v. Land Board of Otago* ((1908) 27 N.Z.L.R. 811, 819, 823-825 ; 10 G.L.R. 433, 440, 442-445). The decision in *Bethune v. Bydder* ([1938] N.Z.L.R. 1 ; [1937] G.L.R. 665) was that the question whether the tenement was a dwellinghouse was collateral. In *Cornford v. Greenwood* ([1938] N.Z.L.R. 291, 301 ; [1938] G.L.R. 163, 168) a determination that the applicant was " guarantor " was held not to be collateral. Thus, in the New Zealand cases, there have been some differences of opinion as to the circumstances in which the principle applies. For English cases, where the matter was held to be collateral to the actual matter which the lower Court has to try, see 9 *Halsbury's Laws of England*, 2nd Ed. 881 (m) ; and for those where the fact is not as collateral : (*Ibid* 882 (p)) ; and generally, (1929) 45 *Law Quarterly Review* 479-482. The soundest approach, however, is not from the cases but from the statutory provisions applicable to the tribunal itself.

The determination of the Land Valuation Court as to when the work which caused the damage was executed was a determination within its jurisdiction : (*Ante*, pp. 139, 147, ll. 15—28), 147, l. 40, to 148, l. 20), for the following reasons : (a) The material statutory provisions in the Land Valuation Court Act, 1948, that are at the foundation of the case are ss. 17, 28, and 37(1). Section 37(1) lends legislative emphasis to the exclusive jurisdiction that is intended to be conferred upon the Land Valuation Court. (b) In order to ascertain when the work was completed under s. 45 of the Public Works Act, 1928, there must first be a determination as to what was the work or portion of the work that caused the damage. The determination as to time necessarily follows upon a determination as to the extent of the work or portion of work that caused the damage. (c) All questions of quantum and causation are within the exclusive jurisdiction of the Land Valuation Court. It is for that Court alone to say whether the work caused the damage, and, if so, to what extent : here, what area was eroded by the work and what area would have been lost by natural erosion if no work had been done. (d) If the Court's determination as to the extent of damage caused by work were not reviewable, it would be arbitrary and illogical to say that its determination as to what was the work and when it was completed is reviewable. Both determinations are within the jurisdiction entrusted to the Land Valuation Court, and what the Court finds as to the work is as much part of the matter entrusted to it as its findings as to causation ; the two cannot reasonably be separated ; and it would be artificial to say that a determination as to the extent of the work so as to be able to ascertain the point of time of its completion is collateral matter going to jurisdiction. Section 37 of the Land Valuation Court Act, 1948, does not contemplate meticulous differentiation between matters collateral to the merits and matters forming part of the merits of the matter coming before the Court.

This was, as stated in the claim to compensation : " The diversion of the

"Manawatu River at Coley's Bend by the construction of cuts or diversions known as Taupunga No. 1 and Taupunga No. 2 and groynes and river diversion work and re-erection of stopbanks and protection work incidental thereto. The Land Valuation Court has said that the works referred to in the claim are severable into several portions and has said 5  
"when each portion was completed. In doing so, it is said to have dealt with a matter collateral to the merits. The ascertainment of the portion of the work that caused the damage and the time when that portion was completed, is all an integral part of the matter before the Court"; just as it was for the Licensing Committee in *Roche's case* 10  
(1888) 7 N.Z.L.R. 206 to determine whether an applicant for a licence qualified, and for the Land Board in *McKellar's case* (1908) 27 N.Z.L.R. 811; 10 G.L.R. 433 to determine whether the applicant there possessed necessary qualifications: and for the Adjustment Commission in *Cornford v. Greenwood* ([1938] N.Z.L.R. 291; [1938] G.L.R. 163) to determine that 15  
the applicant was a "guarantor."

Both *Sullivan v. Mayor, &c., of Masterton* (1909) 28 N.Z.L.R. 921; 12 G.L.R. 136 and *O'Brien v. Chapman* (1910) 29 N.Z.L.R. 1053; 12 G.L.R. 744 are distinguishable. In *Sullivan's case* (1909) 28 N.Z.L.R. 921, 924; 12 G.L.R. 136, 137, *Cooper, J.*, expressed the opinion that a determination as to a limitation of time was a determination on a collateral matter. In *O'Brien's case*, the point was not argued or referred to in the judgment. (a) In neither of those cases was there a privative section such as s. 17 of Land Valuation Court Act, 1948, and in each case it was a question of construing a section on facts as found by the Compensation tribunal and accepted in the higher Court. 25  
It may fairly be said that in both cases the Court was correcting an error of law on the face of the proceedings. (b) Both cases were decided before s. 45 (2) of the Public Works Act, 1928, was enacted to negative the construction which the Court of Appeal placed on s. 45 (1). Sub- 30  
section (2) makes it necessary to determine the portion of the work causing the damage, and that becomes an integral part of the matter before the Compensation tribunal.

If, contrary to earlier submissions, a determination as to when works were executed is a determination on collateral matter going to the jurisdiction, then the construction placed upon s. 45 (2) by the Land Valuation Court is correct (*Ante*, 144, l. 26, 147, l. 5—14) and *Fair, J.*'s interpretation is erroneous. In fact, No. 1 Cut and No. 2 Cut were separate undertakings or works; in fact, No. 1 Cut alone caused damage; therefore, the respondent's claim is barred in law under s. 45 40  
(1). In any case, both Cuts were, at the least, in fact different portions of a work; and the respondent's claim is barred in law under s. 45 (2). *Fair, J.*, (*Ante*, p. 237 l. 55 to p. 238 l. 12) after putting the Hay scheme of 1930 aside, recognized that, neither in the decision of the Board nor from "practical engineering requirements" did the work on No. 1 Cut in 45  
1940 involve doing anything to No. 2 Cut (*Ante*, p. 236, ll. 5-19). In other words, No. 1 Cut was a separate work in itself (*Ante*, p. 238, ll. 20-34, pp. 240-241).

As to the judgment appealed from: (a) His Honour's judgment overlooks the distinction between the work authorized and in fact carried 50  
out, on the one hand, and remedial measures for the purpose of minimizing the damage caused by the work in fact authorized and carried out, on the other hand. It rejects the test that the work is to be measured by what was authorized or intended to be done (*Ante*, p. 239, l. 53, 240, l. 2). It adopts as the test what is necessary to be done to min- 55

imize the damage caused (*Ante*, p. 238, ll. 26-29). This is not justified in construing s. 45, since s. 45 (2) speaks of work which causes the damage. The right to compensation accrues on completion of the work which causes the damage, and compensation may be claimed for all damage likely to occur in the future as if the conditions then existing were to continue. The likelihood of remedial measures may affect the quantum of compensation, but it cannot prolong a completion of the work; e.g., if a local body turns a drain on to A.'s land, that is all it set out to do or intended to do; and it cannot be said that the work is not completed until remedial measures are taken which the local body may never undertake; cf. *Farrelly v. Pahiātua County Council* ((1903) 22 N.Z.L.R. 683, 688, 689; 5 G.L.R. 294, 295). The judgment of the Land Valuation Court draws the proper distinction between a work causing damage and subsequent remedial measures to mitigate that damage, (*Ante*, 148 l. 9-13), and it finds that work on No. 2 Cut was, in fact, for remedial purposes (*ibid.*, 146 ll. 50-54).

(b) The learned Judge having taken the view that the work is not completed until remedial measures are taken, his judgment then proceeds on the ground that necessity of remedial measures is to be ascertained by *ex post facto* considerations (*Ante*, p. 238, ll. 26-29) and, particularly (p. 238, ll. 30-34; p. 240, ll. 49-53). It is not provision or foresight that is to govern the extent of the work, but retrospect—*ex post facto* considerations. Only by this means, the judgment proceeds from the ground that No. 1 Cut did not, in 1940, involve No. 2 Cut to the ground that at some later date work on No. 2 Cut was part of No. 1 Cut. (Contrast the statements on p. 238, ll. 5-12 with p. 240, l. 53.)

(c) The judgment fails to attach proper weight to the words "to finish the same" in s. 45 (2). If it had done so, it would not have departed from the test of authorization and intention in ascertaining the extent of the work, or gone into the realm of mitigating damage.

(d) Apart from the foregoing considerations, there is no basis at all in fact for the crucial finding that the stone-work in early 1950 was part of the work on No. 1 Cut undertaken in 1940 (*Ante*, p. 241, ll. 7-9), because this was merely alternative to the work on No. 2 scheme which the Land Valuation Court found to be remedial only (*Ante*, 139, 142 ll. 5, 6, 7, 8), and because the idea of rock-protection was not conceived until 1949, when it emerged as a recommendation of the Catchment Board contrary to the appellant Board's wish to proceed with No. 2 Cut. The appellant agrees that the purpose was remedial.

(e) The judgment relies on *Carlisle Rural District Council v. Carlisle Corporation* ([1909] 1 K.B. 471, 482) for its construction of s. 45 (2); but that case really supports the appellant's contention (p. 238, ll. 43-45). The Court of Appeal differed from *Channel*, J.'s construction which would have been correct if there had been in England a section similar to s. 45 (2) of the Public Works Act, 1928; but that section is important here.

The Court is reluctant to grant certiorari where its grant involves an examination of facts on which there has been conflict before the inferior tribunal: *R. v. Blakeley* (1950) 82 C.L.R. 54, 92; *McKellar v. Land Board of Otago* ((1908) 27 N.Z.L.R. 811, 825; 10 G.L.R. 433, 445). Here the Land Valuation Court appears to have been influenced by certain witnesses heard by it: (*Ante*, 139, 146 ll. 21-43). It has made a number of specific findings of fact. The view taken in the judgment that Cut No. 2 in 1944 was part of No. 1 Cut in 1940 cannot

be reconciled with the facts as found by the compensate tribunal as to the separate nature and purpose of the works and the cause of damage. The view expressed that rock work in 1950 formed part of work undertaken in 1940 is without any basis in fact. The Court, under a guise of construction, has substituted its own view of the facts.

*G. I. McGregor*, for the respondent. The Land Valuation Court Act, 1948, substitutes the Land Valuation Court for the Compensation Court under the Public Works Act, 1928, and the jurisdiction of the Compensation Court is vested in the Land Valuation Court. Before the passing of that statute, the Supreme Court reserved to itself the power to control the Compensation Court by mandamus or certiorari in appropriate cases: *Eason v. Ward* (1904) 7 G.L.R. 398, 403). The question arises as to whether the reviewing jurisdiction of the Supreme Court is taken away, and, if so, how far it is taken away by s. 17 of the Land Valuation Court Act, 1948, which in Scottish law is termed a "privative section".

The general principle is that the Supreme Court (like the Court of Queen's Bench) is jealous to preserve its controlling jurisdiction over inferior tribunals: *New Zealand Waterside Workers' Federation Industrial Association of Workers v. Frazer* ([1924] N.Z.L.R. 689, 706, 707; [1924] G.L.R. 139, 149, 150). Sections similar to s. 17 of the Land Valuation Court Act, 1948, are well-known in other statutes, e.g., s. 96 of the Industrial Conciliation and Arbitration Act, 1908, and s. 22 of the Mortgagees and Lessees Rehabilitation Act, 1937. It is settled law that privative sections such as these do not extend to the overriding jurisdiction of the Supreme Court to determine applications for writs of mandamus, certiorari, or prohibition where there has been a wrongful refusal of jurisdiction by a want of, or excess of, jurisdiction in the inferior tribunal. The initial approach to the matter is that stated in *Jacobs v. Brett* (1875) L.R. 20 Eq. 1, 6). The matter was developed in the *New Zealand Waterside Workers' Federation v. Frazer* ([1924] N.Z.L.R. 689, 701, 704; [1924] G.L.R. 139, 147, 149) and in *Cornford v. Greenwood* ([1938] N.Z.L.R. 291, 295, 1. 12, 297, 1. 14; [1938] G.L.R. 163, 165, 166). The Land Valuation Court is not the sole and final judge of the limits of its jurisdiction: *New Zealand Waterside Workers' Federation v. Frazer* ([1924] N.Z.L.R. 689, 704). The Supreme Court possesses the authority to determine judicially and authoritatively what are the limits of the inferior Court's jurisdiction. Section 17 of the Land Valuation Court Act, 1948, is deficient in form to s. 96 of the Industrial Conciliation and Arbitration Act, 1908, and to the Mortgagees and Lessees Rehabilitation Act, 1937, in that there is introduced the words "except on the ground of "lack of jurisdiction". But *a fortiori* the decisions reserving the question of jurisdiction to the Supreme Court in matters under those two statutes apply to the Land Valuation Court Act, 1948: and see *Bethune v. Bydder* ([1938] N.Z.L.R. 1, 8 l. 17, 16 l. 16, 30 l. 41; [1937] G.L.R. 665, 671, 675, 683).

If this Court holds that it is not precluded from reviewing the decision of the Land Valuation Court under s. 17 of the Land Valuation Court Act, 1948, the next question is whether the Supreme Court has jurisdiction to review in this particular case. The Supreme Court has jurisdiction to quash and to issue mandamus when the inferior Court has fallen into error in any matter preliminary to, or collateral with, the matters which it has to decide. The Judge of the Land Valuation Court, in declining jurisdiction, has fallen into error, and his decision is open to review: (a) because of his misinterpretation of the provisions of the Public Works

Act, 1928, and, in that sense, he has miscarried in deciding a question of jurisdiction—a question that is extrinsic to, or collateral with, the matter he had to decide; and (b) it is for the Supreme Court to decide for itself the facts on which the question of jurisdiction depends.

- 5 The right to compensation is contained in s. 42 of the Public Works Act, 1928: There is a right of full compensation in respect of injurious affection by "any public works." The Land Valuation Court has to decide on the merits (a) whether the lands of the claimant have been "injuriously affected" by "any public works," and, if so, (b) to assess  
10 the quantum of full compensation.

- As a preliminary or collateral question, the Land Valuation Court has to decide whether the claim for compensation has been made within the period of twelve months after the execution of the works: Public Works Act, 1928, s. 45. The question of compensation under s. 42 is the substantial question going to the merits of the matter; and the questions  
15 arising under s. 45 as to time are jurisdictional matters. The collateral question under s. 45 necessitates, in the first place, the decision by the Land Valuation Court of two matters; and it has fallen into error in respect of both (a) the meaning of the phrase "execution of the works" in s. 45: that is a question of law; and (b) the question of fact whether,  
20 having decided the meaning of "execution of the works," such works have been completely executed.

- As to the extent to which the Supreme Court will inquire into the correctness of the decision of an inferior Court, see *Colonial Bank of Australasia v. Willans* (1874) L.R. 5 P.C. 417, 442 in which there is  
25 consideration of the meaning of the term "want of jurisdiction." This case comes within the third class of the Board's classification: "Certain proceedings which have been made essential preliminaries to the inquiry" (*ibid.*, 444). Mr. Cleary says this case comes into the fourth  
30 class; but it is contended for the respondent that this case comes into the third class, and that the Legislature, by enacting the limitation of claims by s. 45, has made those matters "essential preliminaries" to the main inquiry, which is the inquiry to be conducted, under s. 42: *Reg. v. Arkwright* (1848) 12 Q.B. 960; 116 E.R. 1130; *Bunbury v. Fuller*  
35 (1853) 9 Ex. 111, 140; 156 E.R. 47, 60). The Judge of the Land Valuation Court is bound to commence by inquiring whether or not the claim was out of time; and, whether he decides that inquiry one way or the other, that inquiry is fully open to review; and there is no fundamental difference whether the decision is an error of law or fact: *R. v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128, 156, 158). In *R. v. Blakeley*  
40 (1950) 82 C.L.R. 54, 64, 69-74, 85, 90, 91, 92, 97 where the position was the same as existed here, it was decided that (a) Where the jurisdiction of the inferior Court depends on a question of fact, such facts must be determined independently by the superior Court; (b) mandamus is not  
45 directed against the making of the preliminary inquiry, but against the refusal to hear and determine as the result of that preliminary inquiry; and (c) the superior Court is not bound by the opinion or the inferior tribunal on a question of jurisdiction; that is a matter for the superior Court to determine.

- 50 In cases of jurisdictional matters (either preliminary or collateral), the function of the Supreme Court is to decide for itself on facts affecting the jurisdictional question, independently of the findings of the inferior tribunal and on evidence brought before it *de novo*: *Colonial Bank of Australasia v. Willans* (1874) L.R. 5 P.C. 417, 443; *R. v. Nat Bell*  
55 *Liquors, Ltd.* ([1922] 2 A.C. 128, 153). Furthermore, the judgment of

the Land Valuation Court is a "speaking order"; and, if such order is erroneous in law, certiorari will go, and the order should be quashed: *R. v. Northumberland Compensation Appeal Tribunal* ([1951] 1 K.B. 711, 717; [1951] 1 All E.R. 268, 277; aff on app., [1952] 1 All E.R. 123, 130, 131). The learned Judge, *Fair, J.*, has rightly looked at the evidence brought before him. He was entitled to consider the decision of the Land Valuation Court in so far as it was a speaking order, and he looked at the matter in the light of the affidavits; and that is the duty placed on the Supreme Court.

Even if the inferior Court has heard evidence and come to a conclusion on it, in the preliminary inquiry, the superior Court has to come to its own conclusion on the evidence before it. It gives weight to the proceedings of the inferior tribunal; but if, on the evidence placed before it, the superior Court is satisfied, it will grant mandamus. The affidavits are part of the record and the Supreme Court may consider matters appearing in affidavits: see *R. v. Northumberland Compensation Appeal Tribunal* ([1951] 1 K.B. 711, 715; [1951] 1 All E.R. 268, 277, aff. on app., [1952] 1 All E.R. 128, 130, 131).

It is concluded by authority that a question of time from "the execution of the works" in s. 45 of the Public Works Act, 1928, in which proceedings have to be commenced was a question of jurisdictional fact and, therefore, it was reviewable by the Supreme Court; see *Sullivan v. Mayor, &c., of Masterton* (1909) 28 N.Z.L.R. 921; 12 G.L.R. 136, 137). The same question arose, but was not argued in *O'Brien v. Chapman* (1910) 29 N.Z.L.R. 1053; 12 G.L.R. 744 where mandamus was granted. Although those cases were distinguished by Mr. *Cleary*, his distinctions are not correct, because (a) the presence or absence of a privative section has no effect on the right of the Supreme Court to review for error in jurisdiction; and (b) because s. 45(2) (not then in the Public Works Act under review) is merely definitive of s. 45(1), so that the absence of subs. (2) did not really alter the position as to whether or not it is a question of jurisdiction: see *Killick v. Minister of Public Works* ([1927] G.L.R. 406, 409). The question of time considered as a jurisdictional or preliminary matter was considered in *R. v. Hammersmith Profiteering Committee* (1920) 89 L.J.K.B. 604, 605; *R. v. Shoreditch Assessment Committee* ([1910] 2 K.B. 859, 879). Consequently, a question such as this as to whether or not the claim is brought in time is a matter which affects the jurisdiction of the inferior tribunal. In *In re Roche* (1888) 7 N.Z.L.R. 206 the decision merely went to the question whether or not an applicant for a licence was married: this was a question going to the merits, and it was, therefore, not reviewable; In *McKellar v. Land Board of Otago* (1908) 27 N.Z.L.R. 811; 10 G.L.R. 433 the question in issue here was dealt with only in the judgment of *Edwards, J.*, who relied on special provisions in the particular statute.

[After dealing with the facts:] If the work is to be treated as a number of individual works, then the Land Valuation Court was wrong in not considering each individual claim in relation to each individual part of the work. The application for extension of time to five years was not disposed of by *Fair, J.*, because of his decision on mandamus. Work of various kinds was continued from 1940 until 1950, and the minutes of the Board also show a continuity up to January, 1950; and the claim was lodged on August 15, 1950.

As to the construction of s. 45 of the Public Works Act, 1928: the right to compensation is conferred by s. 42, in which there is given full



compensation for injurious affection resulting from the exercise of powers given to local authorities. Section 45 must be read (a) in the light of the general provision in s. 42 as was done in *Killick v. Minister of Public Works* ([1927] G.L.R. 406, 409), where *Osler, J.*, considered that the two sections must be read together (*ibid.*, 408) (b) in the light of the common law, and of the general obligations imposed on persons interfering with the natural flow of a watercourse: *Coulson and Forbes on Waters and Land Drainage*, 5th Ed. 152, 153, 156, 161, and *Fletcher v. Smith* (1877) 2 App. Cas. 781). A person or body acting within statutory authority has certain obligations imposed upon him if he interferes with a natural watercourse. If he interferes without statutory authority, he has certain obligations imposed by common law. If he interferes by virtue of statutory powers, he is responsible for injurious affection. If he interferes with a natural channel, there is an obligation on him to construct the artificial channel which he is making in such a manner as to take the flow of the river without damage.

The appellant Board, in commencing to construct an artificial channel, must be deemed to have recognized its obligation to provide an artificial channel which would take the flow of flood waters or to pay compensation; so that, apart from its obligations at common law and from its obligations under the statute for injurious affection, its obligation was to complete the matter in a satisfactory way; and it has a duty to pay compensation for any damage arising out of the completed work. The compensation, both at common law and under the statute, has to be paid in respect of injury resulting from the works as a whole, which comprises all matters that are part of the control of the new channel.

The Legislature, in enacting the Public Works Act, 1928, must be presumed to have recognized common-law duties and obligations. In giving a meaning to the words "execution of the works", there must be borne in mind: (a) the right to compensation generally under s. 42, and (b) the ordinary recognized common-law rights.

The duty of the Board, in its interference with the river, as part of its work, was to provide adequate channels to take away the waters of No. 1 Cut without erosion or flooding, and also to provide adequate banking and protective works for such purpose. Throughout, it has recognized such obligations in its comprehensive scheme and has continued to endeavour to obtain successful completion of such scheme, and all auxiliary works have been works ancillary to the general scheme, including works designed to lessen the damage resulting from only partial completion of the general scheme.

In all cases relating to s. 45 of the Public Works Act, 1928, the preliminary inquiry from the point of view of jurisdiction is to ascertain the execution of the works from which the injury has resulted; and the Legislature has endeavoured to give an answer in s. 45(2), before the enactment of which the whole works had to be looked at, whether or not any particular portion of the work was injurious. That principle is now obsolete, as, under subs. (2), a portion of the work may be looked at as causing the injury; that is, in itself, limited by the proviso that such applies only when "such portion in itself (and without reference to any other part of the work)" has caused the damage. Therefore, it is necessary to consider the meaning of the words "execution of the works" in s. 45(1), and how far that meaning has since been limited by s. 45(2). Before the passing of the Public Works Amendment Act, 1910, its meaning was considered in *O'Brien v. Minister of Public Works* (1910) 29 N.Z.L.R. 476; 12 G.L.R. 623 rev. on motion for mandamus



in *O'Brien v. Chapman* (1910) 29 N.Z.L.R. 1053, 1062; 12 G.L.R. 744, 750) where it was held that the phrase, "execution of the works," meant the completion of the whole work authorized, and not the completion of the part thereof which did the damage. The effect of that judgment was modified by the enactment of s. 45(2). The words "anything further" that may be required to be done thereon to finish the same will have no "effect either to increase or lessen the damage" are important. In this case, the respondent Board was going ahead with things that it considered was work required to be done to lessen the damage. Full meaning must be given to the phrase "where such portion in itself (and without reference to any other part of the work) causes the damage". The claimant can have no knowledge of the details or extent of the work. In determining the construction of the section, and the meaning of the words, "execution of the works"; (a) the meaning must be sufficiently comprehensive so as to be of general application, and to meet adequately the various classes of work; (b) it must be certain and clear; and (c) it must be reasonable so that the person affected may be able to ascertain the extent of his injury before being required to claim, and may be in a position to ascertain the date at which the work, or the portion of the work, in respect of which his claim arises has been executed or completed. There, the "public work" within the definition is a river work, and, in reality, a river-diversion work. Here, no portion of such work can in itself and without reference to another portion be said to have caused the damage, as distinct entirely from the remaining portion; and *Fair, J.*, in essence recognized that (*Ante*, p. 241, l. 12).

A number of factors has contributed to the damage, and other portions of the work have been directed to a lessening of the damage, and, as a necessary consequence of No. 1 Cut, to the control of the waters flowing therefrom. [Details those factors:] All those factors show the interconnection of various portions of the work, and reference must be made at all times to other portions of the work, and nobody, not even the appellant Board, knew when work would be stopped or considered finished. In view of the evidence in the Supreme Court, there were a lot of matters relating to the continuity of the work which the Land Valuation Court did not consider.

Even if No. 1 Cut is considered a separate portion of the work, it still has to be considered as to whether that portion alone (and without reference to any other portion) caused the damage. *Fair, J.*, considered that the work was interconnected from a practical engineer's view (*Ante*, p. 241, l. 14). All subsequent work on the control of the flow of No. 1 Cut was continuous work on No. 1 Cut. Even if No. 1 Cut is a separate portion of the work, time does not run against the claimant unless that portion caused the damage without reference to any other part of the work. All matters done to control, or to endeavour to control, the outflow of water from No. 1 Cut are integral parts of the work on No. 1 Cut, and have been so recognized by the appellant Board. Up to the time of the veto by the Catchment Board, the appellant Board had intended to go on with the work, and did not itself know that the work would not be completed.

The Judge of the Land Valuation Court has misdirected himself in not considering, or giving any meaning to, the words "in itself" and (without reference to any other part of the work) in s. 42(2). He has given no consideration whatsoever to other portions of the work to which the first portion has reference. The Judge did not properly paraphrase the words in the section. Furthermore, the Judge has given too narrow a

meaning to the words "thereon to finish the same". He has not considered the words "may be required to be done", and he did not consider the supplementary work, which was part of No. 1 Cut, which he takes as a separate portion of the works which were, in effect, being done to lessen damage. The word "thereon" can apply to the portion causing the damage, where that portion can be divorced as a cause of the damage from other portions of the work (*Ante*, 139, 143, 1. 39). He has overlooked entirely the ancillary matters, and it is not known into which classification he puts various portions of the work.

- 10 It may be suggested that those five subsidiary matters were part of the attempt to divert the river through No 2. Cut which was recommenced in 1944. If that suggestion were made, it indicated the continued inter-connection of the two Cuts and the fact that either has a continuous reference to the other. If No. 2 Cut is a separate work, it is incomplete ; and the cause of the damage was the failure of the appellant Board to complete the No. 2 Cut and to take the accelerated flow of the river and keep it away from Barber's Bend. Such work is incomplete because there is something further required to be done thereon to finish it so as to lessen the damage from it.
- 20 As to the application of s. 45 of the Public Works Act, 1925 : (a) The work, considering all the interconnecting matters, should be regarded as the one work as from 1940, and as not being completed until 1950, when the last stonework was done and the last setting back of the stop-banks was done or is incomplete even now with the failure to complete No. 2 Cut,
- 25 and the work out of which the claim has arisen is the whole work ; (b) If the work is divisible with portions, such portions are not entirely separate works ; and it cannot be said that any portion "in itself (and without "reference to any other part of the work)" caused the damage ; and full meaning must be given to those words in s. 45(2). (c) If, as suggested,
- 30 the damage has been caused by No. 1 Cut, all ancillary works designed to control the flow of the water from No. 1 Cut are part of the work on No. 1 Cut in the sense that they were further things "required to be done "thereon" to effect a lessening of the damage. (d) If the ancillary works are portions of the work to divert the river through No. 1 Cut, and No. 2
- 35 Cut is still incomplete, time has not even yet commenced to run against the respondent. (e) If each individual piece of work is entirely separate, work on the set-backs of the stop-banks has directly caused some items of the damage claimed, and those must be treated separately and the claims are in time. (f) It is not a matter of looking at remedial works
- 40 retrospectively. Matters often arise during any contract which are not covered by the original plans and specifications. Such matters become necessary during the progress of the work or to finish the work as a completely satisfactory job. Nevertheless, they form part of the completed work, and the claimant must have a reasonable opportunity of
- 45 reasonable knowledge as to when the work is completed.

Section 45(2) is restrictive, or may be restrictive, of the full rights of compensation given by s. 42 ; and it must be strictly construed so as not to derogate further from common-law rights than is clearly expressed: *Maxwell on Interpretation of Statutes*, 9th Ed. 85. To arrive at the

50 interpretation of s. 45, regard must also be had to the betterment sections of the Act that go hand in hand with the claim for compensation : see s. 79 of the Public Works Act, 1928 (formerly s. 69 of the Public Works Act, 1908). From 1910, when s. 45(2) was introduced into the Act, the betterment section operating until 1936 was s. 79 of the Public

55 Works Act, 1928 ; and that section directed the Compensation Court to

take into account by way of deduction any increase in the value of such lands likely to be caused by the execution of the works. Section 79 was repealed and replaced by s. 28(1)(d) of the Finance Act (No. 2), 1936; that section in turn was repealed by s. 29(1)(e) of the Finance Act (No. 3), 1944; under all those sections, the local authority is entitled to certain benefits; and its burdens must go hand in hand with its benefits, except in the one exceptional case under s. 45, where portions of the work can be put into entirely separate watertight compartments.

While the work was going on, or there was a prospect of the work's continuing, the local body could claim by way of betterment to the property the accretion that was coming from the work generally and from the prospect of the work; and s. 45 must be read in the light of the betterment sections to try and reach some conclusion that can make the sections work in conformity with each other. That view is consistent with the findings of *Coleman, S.M.*, in delivering the judgment of the Land Valuation Committee in this case. The judgment of *Fair, J.* (*Ante*, 1016 onwards) is adopted. In England, there is another statute where the phrase "execution" is used as in s. 45(1): see s. 68 of the Land Clauses Consolidation Act, 1845, 2 *Halsbury's Statutes of England*, 1st Ed. 1134. That phrase was considered in *In re Sir John Simeon* ([1937] Ch. 525, 539; [1937] 3 All E.R. 149, 156). Under s. 45, the Court has to endeavour to construe that phrase "execution of the works" in s. 45(1); and the further question arises how far that ordinary construction is detracted from by s. 45(2). At any time until the works were finally stopped, the river may have flowed through No. 2 Cut and considerably reduced the respondent's claim, or during such time the lands of the respondent might have derived added protection, enhancement or betterment from the works. Until the acts of the respondent Board had clarified the position, the respondent was not bound to bring his claim.

Therefore, the Supreme Court had jurisdiction to review the decision of the Land Valuation Court. The claim was not out of time. The decision of the Judge of the Land Valuation Court was wrong, both in law and in fact; and this Court should uphold the judgment of *Fair, J.* (*Ante*, p. 233).

*Cleary*, in reply. As to the respondent's contention that the present case falls within the third, and not, as the appellant suggests, the fourth class of case as classified in *Willan's case* ((1874) L.R. 5 P.C. 417), it is doubtful whether this goes in any way to the root of the matter; but the kind of case that is contemplated by the classification is where a notice is necessary before the claim, and that is the kind of case that is mentioned (*ibid.*, 445).

It is artificial to say where there was a lengthy inquiry before the Land Valuation Court, which was substantially devoted to the question as to when the work was completed and what work caused the damage, that it could be said that that is something which is merely a preliminary to the inquiry in the sense that the phrase is used in *Willan's case* ((1874) L.R. 5 P.C. 417). These matters were not even collateral to the merits, but part of the very matter which was entrusted to the Land Valuation Court. *Bunbury v. Fuller* ((1853) 9 Ex. 111; 156 E.R. 47) is an illustration of the fourth class in *Willan's case*. The Court of Appeal in England distinguished that case in *Tithe Redemption Commission v. Wynne* ([1943] K.B. 756; [1943] 2 All E.R. 370). The contention that the Supreme Court is to exercise its own judgment on the facts upon which jurisdiction depends is the kind of contention that may quite easily be overstated. The fact that it is said for the higher Court to come to its own conclusion

on the facts points to the necessity for the collateral question's being, in truth, an isolated point readily severable from the merits, or even one that has been overlooked altogether by the inferior tribunal.

There was no privative section dealt with in *Sullivan v. Mayor, &c.*, of *Masterton* ((1909) 28 N.Z.L.R. 921; 12 G.L.R. 136) or in *O'Brien v. Chapman* ((1910) 29 N.Z.L.R. 1053; 12 G.L.R. 744), which are explainable as showing error on the face of the proceedings. *Killick v. Minister of Public Works* ([1927] G.L.R. 406) was both in form and in substance a motion to set aside an award; and a motion to set aside an award relates to errors on the face of the award, rather than to quashing by certiorari for lack of jurisdiction.

As the Land Valuation Court found, No. 1 Cut and No. 2 Cut were separate works: ([1952] N.Z.L.R. (*Ante*, 139, 147 ll. 3, 7)). They were separately conceived and separately executed in point of time, and they had different objects. The work on No. 2 Cut was remedial in its purpose, as the Land Valuation Court found. That finding was accepted by *Fair, J.* (*Ante*, pp. 237, 238); and His Honour then, on his interpretation of the relevant statutory provisions, held that, notwithstanding that No. 1 Cut was in fact a separate work by itself, it could nevertheless be deemed to include No. 2 Cut, and, following on from that, the stone-work. But, in so far as that was done by a process of construction of statutory provisions, it was erroneous. If His Honour departed in fact from the Land Valuation Court, then he was going from the province of superintendence into the province of review, and arriving at a different finding of fact.

Section 45(2), particularly its concluding words, was intended not to prolong the completion of the works but to abridge the completion of the works. Mr. *McGregor* referred to the betterment section of the legislation as relevant to the construction of s. 45. That was the basis of the decision in *O'Brien's case* ((1910) 29 N.Z.L.R. 1053; 12 G.L.R. 744) and that decision was negated by s. 13 of the Public Works Amendment Act, 1910; and it follows that the betterment section no longer provides a guide to the construction of s. 45. In *O'Brien's case*, the betterment section was treated as governing s. 45; now it can no longer be treated as governing the construction of s. 45.

If the setting back of the stop banks is relied on as part of one continuous work from 1940 onwards, it is really not needed by the respondent, because, on the same reasoning, he can rely on the stone work; but the appellant contends that there was no continuous work of which either of these matters formed part. If, however, the setting back is relied on as a separate work, the difficulty in the respondent's way is the finding of the Court that the damage was caused by the No. 1 Cut; and findings as to causation are not reviewable, even if patently wrong. If the claim in respect of setting back is still alive by reason of the application for extension of time, then such rights as the respondent may be entitled to will be preserved.

*Cur. adv. vult.*

The judgment of the Court was delivered by

STANTON, J. This is an appeal from a decision of *Fair, J.* (*Ante*, p. 233), granting to the respondents writs of certiorari and mandamus in respect of a decision of the Land Valuation Court (*Ante*, 139).

The respondent—whom we shall call Barber—lodged a claim for compensation against the appellant—whom we shall call the River Board—in respect of damage alleged to have been caused by a public work executed

by the River Board. This claim was heard by a Land Valuation Committee, which awarded Barber £1234. From this award an appeal was taken to the Land Valuation Court which held that the claim was out of time and set aside the award. Barber then commenced proceedings in the Supreme Court contending that the Land Valuation Court had wrongly decided the question of time limit and that its decision thereon was subject to review by the Supreme Court and should be quashed and the Land Valuation Court should be directed to hear the claim for compensation on its merits. *Fair, J.*, upheld this contention, and accordingly directed that the decision of the Land Valuation Court should be quashed, and that the claim for compensation should be heard and determined by the Land Valuation Court.

The facts which were not seriously in dispute so far as they related to the question here in issue were briefly as follows : Barber is the owner of a farm on the banks of the Manawatu River at a point where the river takes an "S" shaped course, comprising two bends known respectively as Coley's Bend and Barber's Bend. The River Board, in 1930, decided to put through two cuts for the purpose of eliminating these two bends. Two small pilot channels were accordingly cut but in neither case did the river flow through these channels in any substantial way. In 1940, work on the job was recommenced and the cut known as No. 1 was deepened and enlarged with the result that the river flowed in increasing quantity through it, and, by 1944, or later, the cut was carrying substantially the whole of its flow. The River Board also undertook work on the No. 2 Cut and continued this work, apparently somewhat intermittently, with the object of integrating the cuts so that the river would flow in an approximately straight course eliminating both bends. The work on the No. 2 Cut was unsuccessful and was ultimately discontinued by the River Board because the Catchment Board which had a controlling power prevented the River Board from undertaking any further work on the cut. Other work was done by the River Board in the area, including the construction of groynes in the river and a stone breast work on Barber's river frontage, and successive stopbanks on his land outside the boundary of the river. Barber claimed that his land had been injuriously affected by the works of the River Board in the following respects :

1. Seventeen (17) acres of land lost by erosion at £70 per acre .. .. .	£1,190	
2. Fifteen (15) acres of land reasonably expected to be lost by future erosion at £70 per acre .. .. .	£1,050	40
3. Shifting of the cowshed and reconstruction .. .. .	£1,140	
4. Dismantling, shifting and re-erection of pigstyes, foundations and fences for same .. .. .	£200	
5. The sinking of a new artesian well and the laying of pipes therefrom .. .. .	£160	45
6. Dismantling and re-installation of the machinery in cowshed and re-wiring same .. .. .	£45	
7. Dismantling and removal and re-erection of calf shed and foundations .. .. .	£20	
8. New draining and culverts .. .. .	£25	50
9. Loss of production of 17 acres at 200 lbs. butterfat per acre for five years .. .. .	£1,700	
10. Previous cost of moving fences and pigstyes .. .. .	£200	
	<hr/> £5,730	55

The River Board contended that the whole of the alleged damage was due to the opening of No. 1 Cut and that this was either an entirely separate work or was a portion of the total work which alone had caused the damage, and that, as this cut was completed at least as early as 1944, a claim lodged in August, 1950, was wholly out of time, even if the time for lodging claims were extended by the Court under s. 63 of the Statutes Amendment Act, 1939, to the permitted maximum of five years. The Land Valuation Court accepted that view and dismissed the claim.

The first question that calls for consideration is as to the power of the Supreme Court to review the determination of the Land Valuation Court.

The Land Valuation Court was constituted under the provisions of the Land Valuation Court Act, 1948, and was by that Act given authority to deal with claims for compensation under the Public Works Act, for which purpose all the powers and jurisdiction of a Compensation Court under that Act were vested in the Land Valuation Court. An additional provision, not to be found in the Public Works Act, was inserted in s. 17 of the Land Valuation Court Act, 1948, as follows :

Proceedings before the Court shall not be held bad for want of form. Subject to the provisions of subsection three of section thirteen of this Act no appeal shall lie from any award or order of the Court, and except on the ground of lack of jurisdiction no proceeding, award, or order as aforesaid shall be liable to be challenged, reviewed, quashed, or called in question in any Court.

The effect of this provision would seem to be that the Land Valuation Court in dealing with compensation claims has a status somewhat different from that of a Compensation Court under the Public Works Act, and its award or order can only be reviewed in the Supreme Court on the ground of lack of jurisdiction, and cases such as *Easson v. Ward* (1904) 7 G.L.R. 398) would not apply to awards or orders made by it. Counsel for both parties accepted this position and confined themselves to contending that the decision here in question was or was not made without jurisdiction.

The time limit for lodging claims for compensation is contained in s. 45 of the Public Works Act, 1928, which is as follows :

(1) No claim for compensation under this Act or any former Act relating to public works shall be made (in respect of any lands taken) after a period of five years after the date of the Proclamation taking the said lands, or (in respect of any damage done) after a period of twelve months after the execution of the works out of which such claim has arisen or may hereafter arise ; and all right and title to any compensation in respect of such lands or for damage arising out of the execution of such works, as the case may be, shall after such respective periods absolutely cease.

(2) For the purposes of this section the term " execution of the works " means the completion of the construction of any portion of a work where such portion in itself (and without reference to any other part of the work) causes the damage ; and such portion of the work shall be deemed to be completed when anything further that may be required to be done thereon to finish the same will have no effect either to increase or lessen the damage.

It seems obvious that the Land Valuation Court would be bound to consider and adjudicate upon a contention advanced before it that a claim for compensation was out of time under this section, and for this purpose that Court would necessarily have to inquire as to what the work was and when it was executed. It is equally obvious that it would not be exceeding its jurisdiction in making those inquiries, and logically it seems difficult to see why in a claim properly before it the Land Valuation Court should not be regarded as deciding something that was as much within its proper and exclusive function as, for example, whether any, and if so what, damage had been caused. However, it has long been established that matters similar to this question of time limitation are matters

preliminary or collateral to the merits—in this case, to the occurrence and extent of the alleged damage—and that a decision on those preliminary or collateral matters can be examined and reviewed by the Supreme Court, and, if considered wrong by it, corrected. As was said by Farwell, L.J., in *R. v. Shoreditch Assessment Committee* ([1910] 2 K.B. 859) : “No tribunal of inferior jurisdiction can by its own decision finally  
 “decide on the question of the existence or extent of such jurisdiction :  
 “such question is always subject review to by the High Court, which does  
 “not permit the inferior tribunal either to usurp a jurisdiction which it  
 “does not possess, whether at all or to the extent claimed, or to refuse to  
 “exercise a jurisdiction which it has and ought to exercise. Subjection  
 “in this respect to the High Court is a necessary and inseparable incident  
 “to all tribunals of limited jurisdiction ; for the existence of the limit  
 “necessitates an authority to determine and enforce it : it is a contra-  
 “diction in terms to create a tribunal with limited jurisdiction and un-  
 “limited power to determine such limit at its own will and pleasure—such  
 “a tribunal would be autocratic, not limited—and it is immaterial  
 “whether the decision of the inferior tribunal on the question of the exist-  
 “ence or non-existence of its own jurisdiction is founded on fact or law.”  
 (*ibid.*, 880).

The law is stated in *9 Halsbury's Laws of England*, 2nd Ed. 880, 882, paras. 1484, 1485, as follows :

Where the Court below has acted without jurisdiction *certiorari* to quash the proceedings may be granted. Want of jurisdiction may arise from the nature of the subject-matter ; so that the inferior Court had no authority to enter on the inquiry, or upon some part of it. It may also arise from the absence of some essential preliminary proceeding. Thus, although the inferior Court may have jurisdiction over the subject-matter of the inquiry, it may be a condition precedent to the exercise of its jurisdiction that the proceedings should be begun within a specified time.

The case is more difficult where the jurisdiction of the Court below depends, not upon some preliminary proceeding, but upon the existence of some particular fact. If the fact be collateral to the actual matter which the lower Court has to try, that Court cannot, by a wrong decision with regard to it, give itself jurisdiction which it would not otherwise possess. The lower Court must, indeed, decide as to the collateral fact, in the first instance ; but the superior Court may upon *certiorari* inquire into the correctness of the decision, and may quash the proceedings in the lower Court if such decision is erroneous, or at any rate if there is no evidence to support it. On the other hand, if the fact in question be not collateral, but a part of the very issue which the lower Court has to inquire into, *certiorari* will not be granted, although the lower Court may have arrived at an erroneous conclusion with regard to it.

It will be seen that the learned author refers to a time limit for the commencement of proceedings as a preliminary matter. The authority cited for this proposition is *R. v. Hammersmith Profiteering Committee* ( (1920) 89 L.J.K.B. 604). This case is very briefly reported in the *Law Journal Reports*, but a fuller report is to be found in *R. v. Hammersmith Profiteering Committee* ( (1920) 122 L.T.R. 720). It was a decision of a Divisional Court consisting of Lord Reading, C.J., and A. T. Lawrence and Avory, JJ., and concerned an application for *certiorari* to quash a decision of a Profiteering Committee. By regulations, the Committee was authorized to review hire-purchase agreements but with the limitation that complaints must be delivered to the Committee within four days from the date of sale, and that complaints delivered later “shall be dismissed forthwith”. It was shown that the complaint had not been delivered within the specified time and the Court held that the Committee's decision must be quashed on the ground that there was no jurisdiction to deal with the complaint.

A similar conclusion was reached by this Court in *Oborn and Clark v.*



- Auckland City Corporation* ([1935] N.Z.L.R. 1; [1935] G.L.R. 126). There proceedings were brought to set aside a judgment of the Magistrates' Court which included rates that had become due more than three years before the date of judgment, contrary to s. 77 of the Rating Act, 1925.
- 5 It was held by *Sir Michael Myers, C.J.*, and *Blair and Kennedy, JJ.* (*Herdman and Fair, JJ.*, dissenting) that there was an excess of jurisdiction and prohibition must go against the enforcement of the judgment in respect of the overdue rates. *Kennedy, J.*, said: "Upon the face of
- 10 "the proceedings there was no apparent defect of jurisdiction. The
- "claim was for rates without it appearing that the judgment was asked
- "for in respect of rates for which judgment should not be entered
- "because of s. 77. The defect of jurisdiction was not apparent but was
- "latent, but there was no evidence that the appellant Oborn had know-
- "ledge of the relevant date and with such knowledge allowed proceedings
- 15 "to go by default and judgment to be entered without setting up the
- "objection. Prohibition will lie to restrain the enforcement of the
- "judgment of the inferior Court as to so much of it as is in excess of its
- "jurisdiction. The judgment may be enforced for the two years' rates
- "which were within time, but not in respect of rates for the year 1927-
- 20 "1928" (*ibid.*, 17; 134). It should be added that the matter in controversy there was as to when rates first became due under s. 77, and the judgment of the Magistrates' Court was either right or wrong according to the date that was held to be correct. There is not, it is true, any specific
- 25 reference to a preliminary matter, but if the decision be compared with that of *Salmond, J.*, in *Van de Water v. Bailey* ([1921] N.Z.L.R. 122; [1921] G.L.R. 83) (often referred to with approval) it will, we think, be clear that the question of time limit was in *Oborn's* case ([1935] N.Z.L.R. 1; [1935] G.L.R. 126) regarded as truly jurisdictional in the sense above referred to as distinct from a matter which the Magistrate had exclusive
- 30 jurisdiction to determine but had therein fallen into error.

- The decision of *Cooper, J.*, in *Sullivan v. Mayor, &c., of Masterton* (1909) 28 N.Z.L.R. 921; 12 G.L.R. 136) is also expressed as being founded on the supposition that a time limit for commencing proceedings is a preliminary matter which went to jurisdiction. The learned Judge
- 35 said: "An essential matter in the present case upon which the jurisdiction of the Compensation Court to make its award was based was
- "that the claim was made within one year from the execution of the
- "works. The respondents contended that the claim was not made within
- "that period, and the Court took evidence upon the matter. The facts
- 40 "as found by the Compensation Court are not open to review, but if those
- "facts disclose that the claim was made after the expiration of one year
- "from the execution of the work, the Court would have no jurisdiction
- "to make an award" (*ibid.*, 924; 138). The decision of the Court of Appeal in *O'Brien v. Chapman* (1910) 29 N.Z.L.R. 1053; 12 G.L.R. 744)
- 45 in which it was held that the time limit for lodging a claim for compensation under the Public Works Act, 1908, had been wrongly computed by the Compensation Court and, therefore, must be corrected, may perhaps be said to be equivocal as there is no reference in the judgments to the question of jurisdiction, and, as we have seen in *Easson v. Ward* (1904)
- 50 7 G.L.R. 398), the Supreme Court had assumed that it could control and correct the Compensation Court when it erred, even in matters within its jurisdiction. The only references to the nature of the remedy are in the arguments of counsel in *Sullivan v. Mayor, &c., of Masterton* (1909) 28 N.Z.L.R. 921; 12 G.L.R. 136); *Mr. Skerrett, K.C.*, (as he then was)
- 55 referring to a matter of fact, said: "The finding of the Compensation



"Court (although open to review) will not likely be disturbed on this point as it is on a collateral matter" (*ibid.*, 1053). The *Solicitor-General* said: "The findings of fact of the Compensation Court are not 'conclusive on applications for mandamus'" (*ibid.*, 1056).

We think it can also be said that, even if this was not strictly a preliminary point, it was a case where the jurisdiction depended on a particular fact which was collateral to the actual matter which the Land Valuation Court had to try. A glance at the cases shows that there have been many decisions in which this distinction has been considered, and the results of these are not easy either to reconcile or to reduce to any rational principle. A writer in *60 Law Quarterly Review* has suggested that the division of facts into collateral and material is illogical, and that the fallacy lies in assuming that the fact which the original tribunal has to decide is that which constitutes its jurisdiction. However, the distinction is established, and a Court must in each case determine the matter for itself. A recent application of the principle is to be found in the decision of the High Court of Australia in *R. v. Blakeley* (1950) 82 C.L.R. 54, the Court consisting of *Sir John Latham, C.J., and Webb, Fullagar, and Kitto, JJ.*, who comprised the majority, and *McTiernan and Williams, JJ.*, who were a dissenting minority. This was an application in the High Court for a mandamus to compel a Conciliation Commissioner to proceed with the hearing of an industrial dispute, he having declined to so proceed on the ground that no real and *bona fide* dispute existed. *Fullagar, J.*, outlined the general principles of law applicable in the following passage: "Generally speaking, when a tribunal, other than a superior Court in the technical sense, is called upon to exercise jurisdiction, it must, of necessity, begin by considering for itself the preliminary question whether it possesses the jurisdiction invoked. That question may depend on questions of law or questions of fact or on questions both of law and of fact. As *Griffith, C.J.*, said in *Federated Engine-Drivers' and Firemen's Association of Australasia v. Broken Hill Pty. Co., Ltd.*, (1911) 12 C.L.R. at p. 415: '... the first duty of every judicial officer is to satisfy himself that he has jurisdiction, if only to avoid putting the parties to unnecessary risk and expense.' In the same case *Barton, J.*, said: 'Where the jurisdiction is disputed, adequate and careful inquiry is still the duty of the Court of first instance' (1911) 12 C.L.R. at p. 428. But the important point is that the decision or finding with regard to the existence of jurisdiction, whether it be affirmative or negative, stands in a radically different position from a decision or finding given or made within jurisdiction on the merits of the case. The latter is conclusive and binding subject only to any appeal that may be given: if no appeal is given, it is absolutely conclusive and binding. The former is not conclusive or binding at all. It is open, if it be affirmative and wrong, to prohibition. It is open, if it be negative and wrong, to mandamus" (*ibid.*, 90, 91). The same Judge applied these principles to the particular facts as follows: "The Commissioner has decided that there was not a real and genuine dispute and has refused to deal with the application for an award. What he has decided is a jurisdictional fact, and this Court must examine his finding and decide whether it is correct or not, though, since the question is a question of fact, or at least involves questions of fact, it will, as I have said, regard with respect the Commissioner's view and will not grant mandamus unless satisfied that he was wrong. But, on the material before us, I feel satisfied that he was wrong" (*ibid.*, 93).

No doubt it is difficult and perhaps dangerous to attempt a comparison between the jurisdictional fact in *Blakeley's* case ( (1950) 82 C.L.R. 54) and the alleged jurisdictional fact in this case, but we respectfully agree with the learned Judge in the Court below in thinking that the conclusion in the case cited and the reasoning on which it was founded give strong support to the view that the provision in the Public Works Act, fixing a time limit for commencing proceedings is a jurisdictional fact, and the decision of the Land Valuation Court thereon is accordingly examinable by this Court. We think, too, that it is not without significance that Mr. *Cleary* was not able to cite any case where it had been held that a time limit provision was not to be regarded as preliminary or collateral and so jurisdictional.

It should also be noted that the time limit prescribed by s. 45 of the Public Works Act, 1928, may be extended as provided by s. 63 of the Statutes Amendment Act, 1939, but the power of extension is vested in a Judge of the Supreme Court, and has not been transferred to the Land Valuation Court. It would seem anomalous that a Judge of the Supreme Court should have to determine whether a claim for compensation was out of time so as to raise the question of whether the time limit should be extended, but the Land Valuation Court could then authoritatively determine whether or not the claim was out of time.

We conclude, therefore, that the decision of the Land Valuation Court is reviewable in the present proceedings. It depended on matters both of fact and law, and the next question to be considered is how that Court's finding on the facts is to be dealt with.

Mr. *Cleary* contended that all questions as to what caused the damage are for the exclusive and final determination of the Land Valuation Court, and that this Court is bound to accept and act upon the findings of the Land Valuation Court on the matter. We cannot agree that this is so where the Land Valuation Court is dealing with matters of causation in relation only to the time for the commencement of proceedings; but we accept his contention that this Court will not disregard the Land Valuation Court's findings of fact unless clearly shown to be erroneous. As *Fullagar, J.*, said in *Blakeley's* case ( (1950) 82 C.L.R. 54), "A doubt as to error is resolved in favour of the decision of the inferior tribunal" (*ibid.*, 93). It is, however, the duty of the Supreme Court to examine these findings and to determine as best it can whether it finds them justified. The general position is succinctly stated in the judgment of this Court in *Stratford Borough v. Wilkinson* [1951] N.Z.L.G.R. 67 as follows: "The principle that was laid down by Lord *Esher, M.R.*, in *The Queen v. Income Tax Special Purposes Commissioners* (1888) 21 Q.B.D. 313, 319 was stated by the Judicial Committee in *The King v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128) in the following words: 'if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard; but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on certiorari by a superior Court' (*ibid.*, 158). We think that what was there said shows that, although in such a case the inferior tribunal may, at its peril, determine whether the facts necessary for its jurisdiction exist, the position nevertheless is that the existence or otherwise of such facts, if questioned, is ultimately a matter that is within the competence of the superior Court" (*ibid.*, 823: 349).

In the present case, it is not really the facts that are in dispute so much as the proper inferences from those facts in relation to the provisions of s. 45 (1) and (2) of the Public Works Act, 1928. Before proceeding to an examination of these facts, it is, we think, important to consider the meaning and effect of the language used in the section. This consideration will, we think, be assisted if the history which led to the enactment of subs. (2) is examined. There can be no doubt that the subsection was passed to meet the difficulties discussed in *O'Brien v. Chapman* (1910) 29 N.Z.L.R. 476, 1053; 12 G.L.R. 623, 744). The claimant in that case sought compensation for injury done to his land by the execution of a public work—a railway embankment. In the Compensation Court, *Chapman, J.*, was called upon to decide whether the claim was out of time. The allegation of the claimant was that the embankment which was constructed out to a river, blocked streams flowing through and from his land. It was clear that, once the embankment had been built, everything that did and could contribute to the damage was completed. This was expressly found by *Chapman, J.*, who said: "Nothing that was done later or will be done hereafter could affect the matter so far as this claimant and this claim are concerned" (*ibid.*, 477; 624). He accordingly expressed the opinion that the phrase "the execution of the works" in s. 37 of the Public Works Act, 1908 (now s. 45, Public Works Act, 1928) should be construed in a popular sense as "It is quite evident that the subsequent completion of the ballasting of the line can no more affect the claimant or his claim than the building of a railway station if the traffic should happen to require one" (*ibid.*, 477). He accordingly expressed the opinion that the claim was out of time.

On appeal, *Williams, Edwards and Cooper, JJ.* (*Sir Robert Stout, C. J., dissentiente*), were of opinion that the phrase "the execution of the works" meant the completion of the whole works authorized and not the completion of the part itself which caused the damage. In reaching this conclusion, the majority of the Court was of opinion that any difficulty as to the construction of these words was resolved by a consideration of the provisions of s. 69 (now replaced by s. 29, Finance Act (No. 3), 1944), which contained provisions requiring a deduction to be made for betterment. *Cooper, J.*, however, thought it proper to say: "The difference of opinion which has arisen in this case shows, however, in my opinion, the necessity for the Legislature defining in reasonably exact terms the meaning of the words 'execution of the works'" (*ibid.*, 1067; 753). It seems clear that the Legislature took notice of the somewhat unsatisfactory position which had arisen in that case, for in the same year the Public Works Amendment Act, 1910, added what is now subs. (2) of s. 45.

In the judgment of the Land Valuation Court ([1952] (*Ante*, 139 it is said: "Section 45 (2) of the Public Works Act, 1928, does not appear to have been the subject of judicial interpretation, but we think its meaning is reasonably clear. Its intention is to provide that, where the damage complained of is caused by one portion alone of a total work, the twelve-months' limitation shall run from the completion of the portion of the work. The final phrase of the subsection covers the case where minor additions or adjustments are still required after the portion of the work which caused the damage has been substantially completed. In such a case, that portion of the work is deemed to be completed when anything further that may have to be done 'thereon' to finish the same will have no effect either

"to increase or to lessen the damage complained of. The word 'thereon' is of significance, as indicating that the only further work to which the phrase relates is work on that portion of the work which caused the damage. It follows that the fact that some other work may have been done (not on the portion of the work which caused the damage) to reduce or remedy the damage does not extend the statutory period within which a claim may be made" (*ibid.*, 144 l. 26).

With respect, we are of opinion that the Court's statement is an oversimplification of the matter, and we think it gives insufficient weight to the words "in itself (and without reference to any other part of the work) causes the damage." In some cases (as was the position in *O'Brien's case* (1910) 29 N.Z.L.R. 1053; 12 G.L.R. 744) it may be possible to isolate one portion of a total work as being the exclusive cause of the damage sustained. In other cases (as we think is the position here), the very nature of the work may preclude this from being done. The subsection must be given a reasonable meaning, and it is, we think, clear from the language used, particularly when the matter is considered in the light of the history of the legislation, that the Legislature did not intend to bar claims arising from the execution of a public work until it was or should have been manifest to the claimant that his claim was ripe for determination. The intention of the Legislature as expressed in s. 42 is that "every person . . . shall be entitled to full compensation." If, then, the relationship between the first portion of a public work and the second portion is such that the final damage cannot be ascertained until the whole work is completed, then we do not consider that subs. (2) has any application. If the position were otherwise, then a claimant would at once be met with the answer that the completion of the second portion of the work would lessen the damage and even perhaps, in some cases, convert a claim for injurious affection of land into a claim for temporary injury only: see statement of *Williams, J.*, in *O'Brien v. Chapman* ((1910) 29 N.Z.L.R. 1053, 1061; 12 G.L.R. 744, 749).

The Land Valuation Court came to the conclusion that the whole of the damage complained of arose from the making of No. 1 Cut and that this was either a completely separate work, or, if the whole of the Board's operations in the area should be regarded as one work, it was the portion of that work which alone caused the damage. Mr. *Cleary* amplified this latter concept by contending that No. 1 Cut must be regarded as the portion of the work which alone caused the damage, and all the other works as measures taken to avoid or minimize that damage. The learned Judge in the Court below considered that all the operations undertaken were part and parcel of one work which was still unfinished, and that the No. 2 Cut could not be segregated from the rest of those operations on the basis and with the consequences suggested.

In considering these opposed conclusions, we think it is important to bear in mind the following facts, none of which is really in dispute.

(1) The original intention of the River Board was to open both Cuts. It let a contract for this purpose and the plan prepared for that contract was marked "River Diversion Job No. 10", and had endorsed on it the following memorandum:

The purpose of the works shown on the plan is to divert the Manawatu River via the proposed cuts. The distance from the point of diversion is 45 chains while by the existing river the said distance is 130 chains. The object of the diversion is to relieve the erosion at Coley's and Barber's and to reduce flood risk.

The River Board also purchased the lands necessary for the complete scheme.

(2) The total cost of the work was to be borne by the No. 3 Separate Area—Makerua Subdivision. That is the area which was threatened with damage from the erosion at Coley's Bend; see minutes of the River Board of January 16, 1930, and July 3, 1930.

(3) Barber was consulted about this work and consented to it on the condition that both Cuts were installed contemporaneously. 5

(4) Both Cuts were completed contemporaneously, but both failed to function.

(5) In 1940, when work in the area was resumed, this was to be done subject to Barber's consent, although the terms on which such consent was obtained are not shown: see Minutes of May 3, 1940. 10

(6) The diversion of the river flow through No. 1 Cut was a gradual process and was not complete until at least 1944, and perhaps later. Barber puts the final phase as between 1946 and 1949, but says that the last work was done in 1944. It is said that by 1944 the No. 1 Cut was taking the whole river flow. This does not altogether agree with the minutes of December 21, 1944, and February 15, 1945. 15

(7) On November 18, 1943, the River Board resolved to proceed with the completion of No. 2 Cut at an estimated cost of £4,500, and work evidently commenced shortly thereafter. 20

(8) At or about the same time, further work was done on No. 1 Cut, and this was not expected to be completed till the year 1945/1946: see Minutes of February 15, 1945.

(9) Work on No. 2 Cut continued—apparently somewhat spasmodically—till about the end of 1949, and as late as January 10, 1950, a payment of £125 for this work was approved. Meantime, in 1946, a groyne at the mouth of this cut was constructed and piles were driven, and on October 20, 1949, the installation of two further groynes in connection with this Cut was approved subject to subsidy, but this was not proceeded with. 30

(10) No. 2 Cut was intended by the River Board to be completed, and the attempt to complete it was abandoned or postponed only because of the opposition of the Catchment Board.

(11) Five successive stopbanks have been erected by the River Board on Barber's property between 1945 and 1950, these apparently being rendered necessary by the erosion caused by the opening of No. 1 Cut. In addition, stone breastworks have been erected on Barber's frontage in an endeavour to prevent erosion, the last works being done in 1950 and 1951. 35

(12) Certain further works have been done by dragline or otherwise to endeavour to link the two Cuts and so to obtain a continuous diversion through both Cuts. 40

We think the proper conclusion to be drawn from this narrative is that the River Board has throughout treated the two Cuts as forming together its scheme of river diversion, and that at no stage can it properly be said that the No. 1 Cut was completed as a portion of the work; nor can it be properly said that this was a completed portion. It was not the completion of a portion of the subsequent commencement of alleviation measures. It was the gradual progress of a single job of river diversion not yet fully completed. The matter may be put another way. The opening of No. 2 Cut was intended to be completed early in 1945. On October 10, 1944, the engineer was instructed to press the contractors to "get this cut completed at an early date." Had this work been so completed, and had it achieved the object for 45 50

which it was undertaken, the damage now complained of—or, at any rate, the greater part of it—would not have happened, and it is surely correct to say that this damage was caused not solely by the making of No. 1 Cut, but by the combination of that Cut and the failure of the work on No. 2 Cut. We think the suggested division of the prolonged and extensive operations on and near the two Cuts into two watertight compartments, one the portion causing damage, and the other to remedy that damage, is, in the circumstances, highly artificial and out of keeping with both the original conception of the scheme and its later implementation.

We realize that this conclusion ignores the statement of the Board's engineer set out in the case on appeal, but we point out that it was not for the engineer to say whether the jobs were separate or linked. The property-owner could not know what was in the engineer's mind, but he could, and did, know what action the Board took. The evidence is clear that, as soon as water was flowing in quantity through No. 1 Cut, the Board accepted the position that the matter could not be left at that, and the complementary portion of the scheme—the opening of No. 2 Cut—should immediately be put in hand. The error we find in the judgment of the Land Valuation Court is in dividing the work on the basis of something that is now said instead of on a consideration of what was done. The change in concept to a complete scheme—no one portion of which can be arbitrarily separated from the other portions and considered without reference to them—from three separate and disjointed works is not as drastic as it may appear, and, in our view, it is irresistibly called for by a consideration of the way in which the River Board itself acted. It said, in effect, "Don't worry about this erosion. The work is not finished, and when it is you will have no cause for complaint. It is not our intention to leave you with that eroding danger."

At the present time, the final fate of the scheme is uncertain, but whether it has now been abandoned in the form in which the River Board was attempting to carry it out, or is only being postponed or modified, it is in either case an uncompleted work which, regarded as a whole, has damaged Barber's property, and his claim for compensation for that damage is not out of time.

Numerous cases were cited both in the judgment of the learned Judge in the Court below and in the argument before this Court, but we think it unnecessary to refer to them. The decisive fact seems to us to be that the River Board has by its course of conduct linked all the operations together in such a close association that it is impossible now for it to say, or for a Court to hold, that the damage caused was other than damage from the execution of the works as a whole. If this is the correct view to take of the facts, it is admitted that the claim which has been lodged must be considered and determined by the Land Valuation Court.

In the result, the appeal must be dismissed with costs on the highest scale with an allowance of 50 per cent. additional as from a distance. The respondent will be allowed £15 15s. a day and for second counsel £8 8s. a day for the two extra days of hearing.

*Appeal dismissed.*

Solicitors for the appellant: *Oram and Yorlt* (Palmerston North).

Solicitors for the respondent: *McGregor and McBride* (Palmerston North).

## ECROYD AND OTHERS *v.* MANUKAU COUNTY AND THE TOWN-PLANNING BOARD.

SUPREME COURT. Auckland. 1953. July 13, 14, 15; August 25.  
STANTON, J.

*Town-planning—Extra-urban Town-planning Scheme—Scheme not providing for Matters required to be provided—Provision of All Such Matters not Mandatory and not required by Town-planning Board to be included in Scheme—Proceedings leading to Provisional Approval of Scheme Irregular—Form of Scheme Satisfactory to County and to Town-planning Board not Invalid or Ultra Vires—Scheme including Added Areas not directed by Governor-General in Council—Inclusion of Additional Area in Particular Riding of County not automatically making it Subject to Provisions of Existing Order in Council relating to Rest of Riding—Prohibition or Injunction restraining Town-planning Board from proceeding with Hearing of Objections until Ascertainment of Decision of Governor-General as to Inclusion of Such Areas in Scheme—Town-planning Act, 1926, s. 25 (2), (3), (5).*

Section 25 (5) of the Town-planning Act, 1926, is as follows :—

“ 25 (5) Every [extra-urban] planning scheme prepared pursuant to this Act shall, having regard not only to the present and future requirements of the rural area, or any defined portion thereof, as the case may be, but also to its geographical and economic relationship to any neighbouring city or borough, make provision, with all such particularity as the Board may require, for the matters referred to in the Schedule “ to this Act.”

In an extra-urban town-planning scheme, prepared by the Manukau County Council and provisionally approved by the Town-planning Board, matters referred to in the Schedule to the Act and not provided for in the scheme, included (a) systems of sewerage, drainage, and sewerage disposal; (b) systems of lighting and water-supply; and (c) provision for amenities.

On objection that the scheme did not provide for all the matters for which it was required by the Town-planning Act, 1926, to provide,

*Held*, That the scheme was not invalidated if, in the opinion of the Town-planning Board, no provision could or should be made for any of those matters, as the Schedule was intended as an indication of what should be considered, and not as a mandatory provision for what should be done; and the Court could not condemn a scheme as *ultra vires* because the Town-planning Board did not insist on provision in the scheme for all the matters mentioned in the Schedule.

The Town-planning Board had considered the scheme and purported provisionally to approve it if certain modifications were made. The Secretary to the Board suggested further modifications; and all these suggestions were treated by the Council as being requirements of the Board, and were accepted by it. When the scheme had been thus amended, further modifications were suggested by the Secretary to the Board, and these were agreed to on behalf of the Council, without ever being formally submitted to or considered by it. In the result, the scheme was sealed on behalf of the Board as provisionally approved in a form in which it had not been seen either by the members of the Board or the members of the Council.

On objection on the ground that the procedure for obtaining provisional approval of the Scheme was not properly carried out, and in result the scheme as put forward had not been approved even provisionally by the Town-planning Board,

*Held*, That, though the proceedings leading to the provisional approval of the County's scheme by the Town-planning Board were irregular, the scheme was in a form which satisfied both the County Council and the Town-planning Board; and the Court was not called on to intervene or was entitled to say that the scheme, which was in the stage of provisional approval only, was invalid or *ultra vires* because this had been achieved by methods which were not strictly regular.



In October, 1949, the Governor-General issued an Order in Council which recited that His Excellency was of opinion that preparation and submission of an extra-urban planning scheme for the area described in the Schedule was necessary. The Schedule described an area wholly within and forming part of the Manukau County, being the whole of the three Ridings of Mangere, Pakuranga, and Papatoetoe as described in 1920 *New Zealand Gazette*, 1772, 1773, and parts of the Papakura and Wairoa Ridings of the County as therein particularly described. By a subsequent Order in Council, issued in March, 1950, four separate areas of land included in the Schedule to the earlier Order in Council (all in the Riding of Papatoetoe) and totalling 478 acres, were excluded from the County of Manukau and included in the Borough of Papatoetoe. These areas were rightly excluded from the scheme. By the same Order in Council, two areas totalling 156 acres (which were made part of the Papatoetoe Riding, and formed part of that Riding as then constituted) were excluded from the Borough of Papatoetoe and included in the County of Manukau; and these areas were included in the extra-urban planning scheme.

On objection on the ground that the area dealt with in the scheme differed from that described in the empowering Order in Council, as it excluded some of the land described therein and included other land not so described;

*Held*, 1. That a County Council could not prepare an extra-urban planning scheme unless required to do so by the Governor-General under s. 25 (2) or s. 25 (3) of the Town-planning Act, 1926, and then only in respect of such portion or section of the County as the Governor-General by Order in Council directed; and he had not so directed in respect of these added areas.

*James v. Waimairi County Council* ([1929] N.Z.L.R. 449; [1929] G.L.R. 32, 167) referred to.

2. That the mere inclusion of an additional area in a particular Riding of the County does not automatically make that area subject to the provisions of an existing Order in Council relating to the rest of the Riding.

3. That the fact that no objections to the scheme had come from the added areas could not cure a fundamental defect.

4. That the decision of the Governor-General as to whether or not the areas totalling 156 acres were to be included should be ascertained before objections to the Council's scheme were heard; and to that extent the objecting plaintiffs were entitled to a writ of prohibition or injunction restraining the Town-planning Board from proceeding with the hearing of objections to the Scheme.

In March, 1952, a small parcel of land containing twelve acres and lying within the planning area was excluded by Order in Council from the County of Manukau and included in the Borough of Howick. This alteration came so late that the twelve acres remained in the scheme.

*Held*, That this area should properly be excluded if, and when, the scheme is finally approved.

ACTION in which the plaintiffs claimed the issue of a declaration that the Extra-Urban Scheme Plan of the first defendant in relation to the lands of the plaintiffs was *ultra vires* and void, an injunction restraining the first-named defendant from seeking final approval of its plan, and a writ of prohibition or injunction restraining the second defendant from proceeding to hear objections to or approving the plan. A statement of claim had been filed under Reg. 464 of the Code and plaintiffs now moved for an order in terms of the prayer of that statement of claim. Affidavits had been filed by the parties and these comprised the evidence on which each party relied. The plaintiffs, Howarth Samuel Davenport and Noreen Davenport, had asked to be struck out of the list of plaintiffs, and this had been agreed to, subject to such order (if any) as might be made against them for payment of costs up to the commencement of hearing. The remaining plaintiffs, who were now the only persons pursuing the action, would be referred to herein as the plaintiffs.

The Manukau County Council as the lawful authority of the County



of Manukau was authorized by an Order In Council issued under s. 25(3) of the Town-planning Act, 1926, to prepare and submit to the Town-planning Board an extra-urban planning scheme in respect of the area described in the schedule to the Order in Council. The County Council proceeded to prepare such a scheme and now claimed that the scheme had been provisionally approved by the Town-planning Board. In accordance with the procedure prescribed by the Town-planning Act, 1926, and the Regulations thereunder, this scheme had been advertised, certain objections to it had been lodged, and the Town-planning Board had appointed a Committee to hear and consider these objections; but sittings of the Committee had been adjourned pending the disposal of the present action.

The scheme consisted of a code of clauses and a number of maps but it would be convenient to refer to all these documents as "the scheme."

The plaintiffs were owners of land within the area of the scheme which they wished to subdivide, and they claimed that their rights to do so would be seriously curtailed if, and when, the scheme was finally approved and brought into operation. They attacked the proceedings of the two defendants in relation to the scheme on the following grounds:

1. That the scheme had in fact been prepared as part of the Auckland Metropolitan Town-planning Scheme under the direction or guidance of the Auckland Metropolitan Town-planning Organization.
2. That the scheme did not provide for all the matters for which it was required to provide by the Town-planning Act.
3. That the procedure for obtaining provisional approval of the scheme was not properly carried out, and in result the scheme as now put forward had not been approved even provisionally by the Town-planning Board.
4. That the area dealt with in the scheme differed from that described in the empowering Order in Council; it excluded some of the land described in the Order in Council and included other land not so described.

*Wheaton and Stone*, for the plaintiffs.

*Smytheman and F. M. Brookfield*, for the first defendants.

*Rosen*, for the second defendant.

*Cur. adv. vult.* 35

STANTON, J. The first ground of objection, that the scheme is not really the creature of the County Council but of the Auckland Metropolitan Town-planning Organization, was not, I think, established. Doubtless, the County Council considered, and was bound to consider, the Town-planning Schemes of adjacent local authorities, but I am satisfied that it did, in fact, prepare an Extra-Urban Planning Scheme for which it alone is responsible, and this ground of objection therefore fails.

The second ground of objection is based on the provisions of subs. (5) of s. 25 of the Town-planning Act, 1926, which is as follows:

Every [extra-urban] planning scheme prepared pursuant to this Act shall, having regard not only to the present and future requirements of the rural area, or any defined portion thereof, as the case may be, but also to its geographical and economic relationship to any neighbouring city or borough, make provision, with all such particularity as the Board may require, for the matters referred to in the Schedule to this Act.

Matters referred to in the Schedule and not provided for in the scheme include (a) systems of sewerage, drainage, and sewage disposal, (b) systems of lighting and water supply and (c) provision for amenities.

The defendants reply that the extent to which such provision has to be made depends on the views of the Town-planning Board, and if, in particular cases, no provision can, or should be, made for any of these matters, the scheme is not thereby invalidated. I think this contention is sound; the Schedule is intended as an indication of what should be considered and not as a mandatory provision for what must be done. It would be futile to insist that a scheme should state for instance (if such be the position), that there is no water supply in the area and there is no present prospect of obtaining one. In any case, the Town-planning Board has been given the duty of deciding to what extent—if at all—these matters are to be provided for, and the Court cannot condemn a scheme as *ultra vires* because the Town-planning Board does not insist on provision in the scheme for all the matters mentioned in the Schedule.

On the third ground, Mr. *Wheaton* went into a great deal of detail on the correspondence between the County Council and the Town-planning Board, showing that the Town-planning Board as a Board had considered the scheme and purported provisionally to approve it if certain modifications were made. The Secretary to the Board suggested further modifications and all these suggestions were treated by the Council as being requirements of the Board, and were accepted by it. When the scheme had been thus amended, further modifications were suggested by the Secretary to the Board, and these were agreed to on behalf of the Council, without ever being formally submitted to or considered by it. In the result, the scheme was sealed on behalf of the Board as provisionally approved in a form in which it had not been seen by either the members of the Board or the members of the Council. I agree that these proceedings were irregular, but if, as appears to be the case, the scheme is now in a form which satisfies both the County Council and the Town-planning Board, I do not think the Court is called on to intervene or is entitled to say that the scheme is invalid or *ultra vires* because this has been achieved by methods which are not strictly regular. It must be borne in mind that we are only at present in the stage of provisional approval and this does not seem to me to be more than a step towards final approval, in granting which the Town-planning Board would require to observe with care all the formalities necessary to give vitality and force to an authorized scheme affecting materially the rights and interests of persons having properties within its area of operation. Heretofore, the proceedings between the Council and the Board have been in the nature of negotiations and they have arrived at a result which both for the time being regard as satisfactory. The result of these negotiations is now presented to the public and interested parties can make representations, objections or suggestions, and it must at this stage be assumed that all of these will receive proper consideration, and that the Board will not finally approve the scheme until this has been done. I think, therefore, that this head of objection must fail.

The final ground of objection seems to me more serious. It calls for a full recital of the relevant facts and a careful consideration of the statutory provisions.

In October, 1949, the Governor-General issued an Order in Council which recites that His Excellency is of opinion that preparation and submission of an extra-urban planning scheme for the area described in the schedule is necessary. The schedule describes an area wholly within and forming part of the Manukau County being the whole of the three Ridings of Mangere, Pakuranga, and Papatoetoe as described in the 1920 *New Zealand Gazette*, 1772, 1773, and parts of the Papakura and Wairoa

Ridings of the County as therein particularly described. By subsequent Order in Council issued in March, 1950, four separate areas of land included in the Schedule to the prior Order in Council, and I understand all in the Riding of Papatoetoe, and totalling 476 acres, were excluded from the County of Manukau and included in the Borough of Papatoetoe. These areas have been excluded from the scheme and I would think that this was rightly done. It could not be expected that the Manukau County Council would operate an extra-urban planning scheme in an area which had become portion of an adjoining Borough, and the original Order in Council would, I think, cease to operate so far as those areas were concerned. By the same Order in Council, two areas totalling 156 acres were excluded from the Borough of Papatoetoe and included in the County of Manukau. I understood from Mr. *Smytheman* that these areas were made part of the Papatoetoe Riding, and this may be so, although the Order in Council does not so provide. I assume, however, that they do form part of that Riding as now constituted. These areas are included in the scheme and Mr. *Smytheman*, contends that this is validly done because the original Order in Council related to the whole of the Papatoetoe Riding, as then existing, and whatever land subsequently became part of that riding became automatically subject to the empowering Order in Council. I cannot think that this is so; the schedule to the Order in Council expressly limits the area affected to the three ridings named as described in certain gazette notices, and it would not, therefore, be permissible to read this as applying to those ridings as they might subsequently be altered, and in particular to land which was later included therein. As to these added lands, the Governor-General has never indicated that in his opinion these lands should be subject to an extra-urban planning scheme, still less has he directed the County Council to prepare such a scheme for these areas of land. It cannot be said that, because these areas were formerly within a borough and therefore liable to be included in a town-planning scheme, they must of necessity be treated as suitable for an extra-urban planning scheme and dealt with accordingly. It could be that these areas were transferred to the County because they were not in fact suitable for any type of town or extra-urban planning. It is shown that no objections to the scheme have come from these areas, but that fact cannot cure a fundamental defect if there be one, and, in my view, there is. The County Council can include in an extra-urban scheme only such land as the Governor-General declares to be advisable, and he has not so declared in respect of these areas. When I suggested to Mr. *Smytheman* the advisability of obtaining another Order in Council, he said it might not be possible to obtain it. If that be so, it could surely only be because the Governor-General did not consider it advisable that this land should be so dealt with, and in the result the County Council would become the authority to select an area for extra-urban planning instead of, and even as opposed to, the Governor-General, as required by the Act.

There is a third Order in Council affecting this area; in March, 1952, a small parcel of land containing twelve acres and lying within the planning area was excluded from the County of Manukau and included in the Borough of Howick. This alteration came so late that the twelve acres have remained in the scheme but, as I have said above, I think they should properly be excluded if, and when, the scheme is finally approved. I gather that the description of the planning area in the Code of Clauses does not now correspond with the maps forming part of the scheme. This can and, no doubt, should be corrected in the process of final approval.

I have considered the authorities cited by Mr. *Smytheman* but they all seem to me to be distinguishable on the ground that the statutes there considered were very materially different from the one here in question. Had we been dealing with two boroughs where all the lands in both boroughs came automatically into the town-planning schemes which the respective Borough Councils were required to prepare, then Mr. *Smytheman's* arguments would have great weight. My conclusion as to the operation of subs. (3) of s. 25 is strengthened by a consideration of the alteration made in s. 25 by the Legislature following the decision of the Court of Appeal in *James v. Waimairi County Council* ([1929] N.Z.L.R. 449; [1929] G.L.R. 32, 167). Subsection (4) of the original s. 25 provided that a County Council could, if it wished, prepare a regional planning scheme (the equivalent of an extra-urban planning scheme) for the whole or any defined portion of the County, but by the Amendment Act, 1929, this subsection was repealed, and in result a County Council could not prepare an extra-urban planning scheme unless required to do so by the Governor-General under subs. (2) or subs. (3) of s. 25, and, of course, only in respect of such portion or section of the County as the Governor-General by Order in Council directed. I do not feel convinced that the mere inclusion of an additional area in a particular riding of the County would automatically make that area subject to the provisions of an existing Order in Council relating to the rest of the riding.

If I am right in the view I have just expressed, then the decision of the Governor-General as to whether or not the 156 acres above-mentioned are to be included should be ascertained before objections to the Council's scheme are heard, and to that extent the claim of the plaintiffs to a writ of prohibition or injunction restraining the Town-planning Board from proceeding with the hearing of objections to the scheme at present would seem to be justified.

I have considered the suggestion that, in the exercise of the discretion given to the Court in relation to these equitable remedies, I should refuse to grant a writ of prohibition in the present case. I do not think I should accede to that request. The plaintiffs have a substantial interest in asking for compliance with all legal requirements in connection with the scheme, and I think they are entitled to the relief they claim.

The form of the order may require some consideration as may also the question of costs. If these matters cannot be agreed on, the matter can be brought again before me and I will settle any outstanding differences.

*Writ of prohibition accordingly.*

Solicitors for the plaintiff: *Bamford, Brown, and Wheaton* (Auckland).

Solicitors for the first defendant: *Brookfield, Prendergast, Schnauer, and Smytheman* (Auckland).

Solicitors for the second defendants: *Meredith, Meredith, Kerr, and Cleal* (Auckland).

## FINDLAY v. VALUER-GENERAL.

LAND VALUATION COURT. Auckland. 1953. August 24; November 3. ARCHER, J.

*Valuation of Land—Capital Value—Valuation for District Valuation Roll—Estimating Various Interests in Land—Mortgages or Charges disregarded—Apportionment of Value between Owners of Different Interests where Owner of Fee Simple divested of Lesser Interests—No Deduction from Capital Value for Charge not Constituting Interest in Land or for Interest of No Value or Impossible to Value—Valuation of Land Act, 1951, ss. 2, 8, 9, 11, 13, 15, 45.*

The owner of any estate or interest in land is entitled to have that estate or interest valued under the Valuation of Land Act, 1951, and entered upon the district valuation roll. In valuing that estate or interest, any mortgage or other charge thereon is to be disregarded.

Where, in respect of any land, there are more interests and more owners than one, the united capital values of the interests of all the owners must not be less than the capital value of the land if held in fee simple by a single owner free from encumbrances.

Consequently, no deduction may be made from the capital value of land by reason of a charge thereon which does not constitute an estate or interest in land, or which, though it may constitute an interest in land, has no value or cannot be valued.

*Valuer-General v. Public Trustee, ((1941) 4 N.Z.L.G.R. 135) applied*

An objection by the owner of a property, which is apparently held in fee simple, and which has been valued as such upon the revision of a district valuation roll, can succeed only if the objector can show that he has divested himself of an interest in the land, the value of which can be separately assessed.

The appellant, who was the owner of a house property divided into two flats, appealed against a decision of the Auckland No. 2 Land Valuation Committee which confirmed, subject to minor adjustments, the Valuer-General's valuation of the property upon a revision of the District Valuation Roll.

The appellant conceded that the tenancies on which she based her objection were not interests in land, and made no attempt to show that they had an assessable value. She contended, however, that the capital value of the property should be limited to market value as if sold as a tenanted property.

*Held, 1.* That, as this was not a case in which there were more interests in the land and more owners than one, s. 45 of the Valuation of Land Act, 1951, did not apply.

*2.* That, in terms of s. 8, the estate or interest of the owner in the land had to be valued as if unencumbered by any mortgage or other charge thereon.

*3.* That, as the appellant had not shown she had divested herself of a leasehold or other interest which was capable of separate valuation, she was properly assessed with the full value of the unencumbered fee simple of her property.

*Semble.* That, if the appellant's tenancies were upon a monthly or weekly basis, the tenants might be possessed of interests in land, though it was difficult to give such limited interests a monetary value; but if the tenancies (so-called) were no more than "statutory tenancies" under the Tenancy Act, 1948, the tenants had no estate or interest in land, and no more than a statutory right to remain in possession.

*Cameron v. The King, ((1947) 6 N.Z.L.G.R. 381) followed.*

APPEAL by the owner of a house property divided into two flats and situated at Mt. Albert, Auckland, brought against a decision of the Auckland No. 2 Land Valuation Committee which confirmed, subject

to minor adjustments, the valuation placed upon the property by the Valuer-General upon a revision of the district valuation roll for the Borough of Mt. Albert as at March 31, 1952.

It was common ground that the flats were tenanted; that, if offered for sale on a "vacant possession" basis, the property might reasonably be expected to realize the amount fixed by the Committee as its capital value (£2,725); and that, if offered for sale subject to existing tenancies, it would not realize that amount. It was contended by the owner, as objector before the Committee and as appellant before the Court, that she was entitled to have the property valued for Roll revision purposes on the basis of the price it might be expected to realize if sold as a tenanted property. The question before the Court was limited to that issue.

*Mead*, for the appellant.

*Rosen*, for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by

ARCHER, J. The duties of the Valuer-General in respect of the preparation and revision of district valuation rolls are set out in the Valuation of Land Act, 1951, the title to which reads:

An Act for the compilation of certain enactments relating to the periodical valuation of landed properties.

We think it is of importance to note that the principal provisions of the Act appear to be concerned with district valuation rolls. Sections 8 to 17 provide for the preparation, revision and alteration of district valuation rolls, ss. 18 to 25 relate to objections to valuations, and ss. 28 to 34 set out the purposes for which district valuation rolls may be used. The first, and apparently the principal, purpose of a district valuation roll (as set out in ss. 28 to 30) is to provide a basis for the compilation of the valuation rolls to be used by local authorities for purposes of rating. Sections 35 to 46 contain general provisions concerning valuations and as to the powers and duties of the Valuer-General in the exercise of his functions under the Valuations of Land Act, 1951.

It would seem, therefore, that the primary purpose of the Act is to establish district valuation rolls as a basis for rating and to keep such rolls up to date by revision from time to time. The provisions in the Act for the use of valuation rolls for other specific purposes, and for the making of new valuations in connection therewith, appear to be subsidiary to that primary purpose. The conclusion follows, we think, that the values fixed on the revision of a district valuation roll should be such as to provide an equitable basis for the assessment of rates. The basis of valuation to be adopted is, however, determined by the provisions of the Act itself, to which we shall now refer.

The valuation now the subject of appeal was made upon the revision of a district valuation roll under s. 9 of the Valuation of Land Act, 1951. The duties of the Valuer-General on such a revision are set out in s. 11 of the Act, which reads as follows:

11. For the purposes of any revision under the foregoing provisions of this Act the Valuer-General shall amend the roll by making all such alterations as are necessary in order that the capital and unimproved values and value of improvements of all the properties to which the revision relates may be readjusted and corrected so as to represent the correct values as at the time of revision, and for that purpose he may make such fresh valuations as may be required.

We are concerned in this appeal only with the capital value of the property in question. "Capital value" is defined in s. 2 of the Act as follows :

2. In this Act, unless the context otherwise requires,—

"Capital value" of land means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charges thereon, might be expected to realize at the time of valuation if offered for sale on such reasonable terms and conditions as a *bona fide* seller might be expected to require :

Two other definitions in s. 2 are relevant to our inquiry :

"Land" means all land, tenements, and hereditaments, whether corporeal or incorporeal, in New Zealand, and all chattell or other interests therein, and all trees growing or standing thereon.

Provided that the value of any trees that have been planted (other than fruit trees or live hedges), and the value of any trees that have been preserved for shelter or ornamental purposes, shall not be included in any valuation appearing in a valuation roll supplied by the Valuer-General to a local authority pursuant to section twenty-eight hereof.

"Owner" means the person who, whether jointly or separately, is seised or possessed of or entitled to any estate or interest in land.

It is desirable also to set out the relevant portions of s. 8 which indicates the particulars which are to be set out in a district valuation roll :

8. A district valuation roll shall be prepared for each district, and shall be in the prescribed form, and shall set forth in respect of each separate property the following particulars :

(a) The name of the owner of the land, and the nature of his estate or interest therein, together with the name of the beneficial owner in the case of land held in trust.

It is clear from the foregoing provisions of the Act that, although the valuation roll is described as a roll of "separate properties" any estate or interest in land which is held in separate ownership may be a separate property for roll purposes, and may be valued accordingly. Conversely, it would appear that nothing can be entered as a property in a district valuation roll which is not an estate or interest in land. The statutory definition of "land" appears to be the decisive factor in determining what may be entered on a district valuation roll. Confirmation of this is found in s. 13, the relevant portion of which reads as follows :

Where for any reason the value of any interest in any land or of any thing included for the purposes of the principal Act in the meaning of the term "land" has not been included in the value of any land as appearing on any district valuation roll, the value of that land, interest, or thing shall be entered on the district valuation roll.

It will be noted that the definition of "land" includes "all chattels or other interests therein." Leasehold interests in land may, therefore, be the subject of separate entries in a district valuation roll. Leases and interests of a like character are, however, the subject of the following special provisions in the Valuation of Land Act, 1951 :

15. The Valuer-General may also at any time, and from time to time, during the currency of a roll make such alterations or adjustments of value in the case of land which is leased or subject to any other terminable charge or interest as are necessary for the purposes of correctly assessing the respective interests of the respective owners at any specific time.

45. (1) Where land is subject to a lease or in any other case where there are more interests therein and more owners than one, the united capital values, values of improvements, and unimproved values respectively of the interests of all the owners shall not be estimated at less than the capital value, value of improvements, and unimproved value of the land would be estimated at if held by a single owner in fee simple and free from any lease or encumbrance, anything to the contrary in this Act notwithstanding.



(2) For the purposes of this section—

(a) The interest of a lessor is the present value of the net rent under the lease for the unexpired term, plus the present value of the reversion to which he is entitled.

5 (b) The interest of a lessee is the present value of the excess (if any) of five per cent. per annum upon the capital value of the leased land over and above the aforesaid net rent for the unexpired term, plus the present value of any right to compensation or of purchase or other valuable consideration to which he is entitled under the lease, and minus the interest (if any) of a sublessee.

10 (c) The interest of a sublessee shall be computed in the same manner, with the necessary modifications, as that of a lessee, and so on in like manner for any interest inferior to that of a sublessee.

(d) All apportionments of the interests of lessors, lessees, and sublessees in respect of improvements and of land exclusive of improvements shall be made in the proportion that the capital value of the leased land bears to the value of the improvements thereon and to the unimproved value thereof respectively, subject *pro tanto* to any provisions of the lease whereby the lessee or sublessee has a special interest in the improvements or in the land exclusive of improvements, as the case may be.

(e) All computations of present values shall be made on a five per cent. per annum compound interest basis.

20 (f) "Lease" includes agreement to lease, licence, and any other written document for the tenancy or occupation of land; "rent" includes premium, fine, royalty, and any other consideration for the tenancy or occupancy of land.

The statutory provisions which have been quoted enable us to formulate certain propositions which emerge from their consideration

25 as a whole :

1. That the owner of any estate or interest in land is entitled to have that estate or interest valued and entered upon the district valuation roll.

30 2. That, in valuing that estate or interest, any mortgage or other charge thereon is to be disregarded.

3. That, where in respect of any land there are more interests and more owners than one, the united capital values of the interests of all the owners must not be less than the capital value of the land if held in fee simple by a single owner free from encumbrances.

35 We think that a further and consequential proposition based upon these propositions may be enunciated :

4. That no deduction may be made from the capital value of land by reason of a charge thereon which does not constitute an estate or interest in land, or which, though it may constitute an interest in land, has no value or cannot be valued.

40 We conceive that this proposition is in accordance with the decision of Blair, J., in *Valuer-General v. Public Trustee*, ((1941) 4 N.Z.L.G.R. 135) which concerned the valuation of certain long-term leases conferring the right to mine coal and fireclay, with other incidental rights and powers. At the time of valuation, all the coal and fireclay had been removed from the lands concerned, but the lessees were still required to pay the rentals reserved by the leases during their respective terms, by virtue of the personal covenants contained therein.

50 On an appeal by the Valuer-General, who contended that the respective leasehold interests should be valued by the methods now prescribed in s. 45 (2) of the Valuation of Land Act, 1951, it was held that, as the subject matter of the lease—the coal and fireclay—had, in each case, ceased to exist, there was no longer any "land" to value, and that the personal covenant to pay rent, though at one time relating to land, no longer constituted an interest in land, but had become a mere chose in action which was not within the definition of "land" in the Valuation of Land Act, and so could not be valued under the Act.



Though concerned with the valuation of leases, the decision in *Valuer-General v. Public Trustee*, ((1941) 4 N.Z.L.G.R. 125) contains much that is pertinent to the issue now before us. After referring to the fact that, notwithstanding the exhaustion of the minerals referred to therein, the leases conferred certain other rights which might constitute interests in land, *Blair, J.*, said: "If these rights or any of them were, at the time of making the so-called valuation, of assessable value, then the land to which these rights appertained should have been assessed in the normal manner, and the value of any right or easement therein separately so valued" (*ibid.*, 11; 629).

As to the method of valuing land held in more interests than one, he said: "In all ordinary cases, the valuer would first look at the land, and, having ascertained its value, would then look at the interests therein and value those" (*ibid.*, 11; 629).

He rejected the contention that the value of the lessors' and lessees' interests must necessarily be assessed by the somewhat arbitrary methods prescribed in s. 45 (2), and held that, before s. 45 (1) could be applied, valuations of the respective interests should first be made "in the normal manner," *i.e.*, by assessing what they might be expected to realize if offered for sale on reasonable terms and conditions by a *bona fide* seller. He was of opinion that the aggregate values of the respective interests should not merely be "not less than", but should be "equal to" the capital value of the land as a whole.

As we understand it, *Valuer-General v. Public Trustee*, ((1941) 4 N.Z.L.G.R. 135) is authority for the proposition that the duty of the Valuer-General in valuing any property is, first, to value the property as a whole, then to value separately the several interests (if any) therein which are held by different owners, and, finally, to see that the aggregate of the capital values assigned to the respective interests is equal to the capital value assigned to the whole.

The Valuer-General in the present case valued the property as one in which no one but the appellant had any estate or interest. In disregarding tenancies, he followed his usual practice, and one which he claims to be both in accordance with the Valuation of Land Act, 1951, and logically desirable in the preparation of a roll to be used for rating purposes. In so far as the latter is a relevant consideration, we are in agreement with the Land Valuation Committee which said in its judgment: "It would be inequitable if owners of properties in which they themselves were residing should be asked to bear a substantially higher proportion of rates than absentee landlords, merely because, being themselves occupiers, they could notionally give vacant possession of their properties in the event of a hypothetical sale, and so in theory secure higher prices."

The question before us, however, must be decided by reference to the Act itself, but having due regard to the fact that, in accordance with the Act, the onus of proof rests upon the appellant as the objector to the valuation. In our view, the assessment made by the Valuer-General, subject to the minor adjustments made by the Committee, was a proper valuation of the property as a whole and one made "in the normal manner", as was his first duty according to *Valuer-General v. Public Trustee*, ((1941) 4 N.Z.L.G.R. 135). Under the rule as to onus of proof, it is for the appellant to satisfy us that this valuation should be reduced.

It is, therefore, important to note precisely what is contended and what not contended by the appellant. What is contended is that the

capital value of the property should be limited to its market value if sold as a tenanted property. This is agreed by the Valuer-General to be something less than the capital value as found by the Committee. The appellant does not claim, however, that the tenancies constitute  
5 interests in land, or that the rights of the tenants (whatever they may be) can be separately valued.

It is obvious, of course, that, if the appellant's flats had been leased for terms, there would have been separate estates to value, and the value of the property as a whole could have been apportioned between  
10 the appellant and her tenants. If the tenancies are upon a monthly or weekly basis it may be, though the matter was not argued, that the tenants are possessed of interests in land, but it is difficult to see how such limited interests could be given a monetary value. If the tenancies (so called) are no more than "statutory tenancies" under the Tenancy  
15 Act, 1948, the tenants have no estate or interest in land, and no more than a statutory right to remain in possession: *Cameron v. The King*, (1947) 6 N.Z.L.G.R. 381). No evidence is before us as to the precise character of the tenancies, but counsel for the appellant conceded for the purposes of his argument that the tenants were not possessed of  
20 interests in land.

It accordingly follows that this is not a case in which there are more interests in the land and more owners than one, and it is not a case to which s. 45 applies. The terms of that section, however, are by no means irrelevant to the issue before us. What has to be valued, according  
25 to s. 8, is the estate or interest of the owner in the land. The definition of capital value makes it clear that the owner's estate or interest is to be valued as if unencumbered by any mortgage or other charge thereon. Section 45 provides that, where there are leasehold or other interests, and, therefore, more owners than one, the aggregate  
30 of the capital values assessed shall not be less than the capital value of the land "if held by a single owner in fee simple free from any lease" or encumbrance." These words indicate, in our opinion, that an owner of land must be assessed with the full value of the unencumbered fee simple unless he can show that he has divested himself of a leasehold  
35 or other interest which is capable of separate valuation.

To approach the matter from a slightly different angle, we are of opinion that the primary function of the Valuer-General under the Valuation of Land Act, 1951, is to value estates or interests in land, disregarding mortgages and charges or encumbrances which do not constitute  
40 interests in land. By this means, the Legislature has sought to ensure that every property bears its fair share of liability for rates. Its intention, as set out in the Act, is that, where an owner in fee simple has divested himself of a lesser estate or interest in land, the value of the land, and the consequent liability for rates, may be apportioned  
45 between the owners of the various interests in the land in accordance with the values of their respective interests. It is equally its intention that mortgages and encumbrances or charges not amounting to interests in land are to be disregarded, so as to leave an owner of land which is subject to such mortgages, encumbrances or charges solely liable for the rates assessable on the land, valued as an unencumbered freehold. We  
50 think that the tenancies concerned in this case fall within the class of encumbrances or charges which do not constitute interests in land and which must in consequence be disregarded.

To sum up, we are of opinion that an objection by the owner of a  
55 property which is apparently held in fee simple and which has been

correctly valued as such upon the revision of a district valuation roll can succeed only if the objector can show that he has divested himself of an interest in the land, the value of which can be separately assessed. In the present case, the appellant conceded that the tenancies on which she based her objection were not interests in land, and made no attempt to show that they had an assessable value. 5

The appeal, therefore, fails and is disallowed.

*Appeal dismissed.*

Solicitors for the appellant : *Newbery and Mead* (Auckland).

Solicitor for the respondent : *Crown Solicitor* (Auckland).

### BARBER v. MANAWATU-OROUA RIVER BOARD.

LAND VALUATION COURT. Palmerston North. 1953. September 3 ;  
November 3. ARCHER, J.

*Public Works—Compensation—Assessment of Compensation—Loss of Land as Result of River Diversion Operations—Injurious Affection to Other Land by Erosion—Compensation for Delay in Payment for Land lost—Award of Interest until Payment of Compensation awarded—Deduction of Value of Accretion to Claimant's Land—Public Works Act, 1903, s. 42—Land Valuation Court Act, 1943, s. 28.*

Following the judgment of the Court of Appeal, reported ([1953] N.Z.L.R. 1010), the claim for compensation came before the Land Sales Court for the purpose of assessing the compensation to which the claimant was entitled, on appeal by both parties from the decision of the Land Valuation Committee, which had awarded a net sum of £1,234.

It was agreed that, as a result of the operations of the River Board, the course of the Manawatu River adjacent to the claimant's land was so changed as to cause the loss by erosion of 8 acres of land, and to require the original stopbank to be set back five times and finally to be so placed that 6 acres of his land was now outside the stopbank, apart from the 8 acres lost (in respect of which the compensation to be awarded had been agreed on). The 6 acres outside the stopbank were held by the Committee to have depreciated in value, on account of risk of flooding and loss of topsoil, from £70 to £35 per acre.

An area of some 12 acres of land situated in what was known as Barber's Bend, and originally part of the bed of the Manawatu River, in recent years, due to the straightening of the river, had been forming an accretion to the claimant's land. The evidence showed that this area had already some grazing value and that there was good reason to suppose that in due course it would be of considerable value to the claimant, who should ultimately be able to obtain title thereto. The Land Sales Committee on this account deducted £300 from the compensation awarded, being an allowance of £25 per acre for the 12 acres in question. The Committee refused to make an allowance for possible further losses of land from the action of the river, though the claim included an item of £700 on this account.

On the re-assessment of the compensation to which the claimant was entitled,

*Held*, 1. That, as the claimant was paid at the rate of £70 per acre for all the land actually lost, he was entitled to depreciation only in respect of the

difference between the 6 acres now outside the stopbank and the 4 acres which was outside the stopbank when the work in the Cuts commenced, or for 2 acres at £35 per acre.

2. That the Committee's allowance on account of the 12 acres accretion of £25 per acre was too high, and the allowance should be reduced to £20 per acre, and the deduction on this account to £240.

3. That, where the amount to be paid for the loss of the land itself has been determined, as had been done here by agreement, nothing more may be claimed in respect of the land (as for loss of farm revenue or profits) save that an additional sum may be allowed to the claimant for having to wait for his money from the time the land was lost until the date of payment, and the most convenient method of assessment of this further sum was by way of interest or by analogy to interest; and that a round sum of £150 should be awarded on this account.

*R. v. Irving Oil Co.* ([1946] 4 D.L.R. 625; [1945] Ex. C.R. 228) followed.

4. That the claimant was entitled to be compensated for the fact that his loss of land was spread over a period of six years before the date of his claim, and, in consequence, he had had to wait a considerable time for his money; and interest at the rate of 4½ per cent. per annum on amount awarded from the date on which the claim was lodged to the date of payment should be directed.

*Marshall v. Minister of Works* ([1950] N.Z.L.R. 339; [1950] G.L.R. 20) and *Marshall v. Commissioner of Taxes* ([1953] N.Z.L.R. 335) referred to.

5. That a small allowance should be made on account of the possibility of further erosion.

6. That the claimant be awarded, in all, the sum of £990, with interest thereon from the date on which the claim was lodged, August 15, 1950, to date of payment; and an allowance towards his costs and witnesses' expenses.

CLAIM FOR COMPENSATION under the Public Works Act, 1908, first heard in the Land Valuation Court on a cross-appeal by both parties against a decision of the Palmerston North Land Valuation Committee was the subject of a judgment of that Court delivered on May 16, 1952: 5 reported ([1952] N.Z.L.R. 452; [1952] G.L.R. 335). The appeal by the respondent was thereby allowed and the Committee's award of compensation vacated on the ground that the appeal was out of time.

Following an application by the claimant for writs of certiorari and mandamus in the Supreme Court and a subsequent appeal by the River 10 Board to the Court of Appeal, the legal issue on which the respondent had succeeded before this Court was ultimately decided in favour of the appellant in the Court of Appeal: *Manawatu-Oroua River Board v. Barber*, *Ante*, p. 232. The claim now came before the Land Valuation Court again for the purpose of assessing the compensation to which the 15 claimant was entitled.

*G. I. McGregor*, for the claimant.

*Yorlt*, for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by

20 ARCHER, J. The original claim, which was dated August 15, 1950, comprised eleven items amounting in all to £5,730, but at the hearing before the Committee the claim was reduced to £4,213, assessed as under:

							£
25	Loss of land	..	..	..	..	..	1,190
	Loss of revenue	..	..	..	..	..	1,274
	Removing cowshed	..	..	..	..	..	600
	Removing calfhouse	..	..	..	..	..	20

Loss of use of artesian well .. .. .	120	
Removing milking machinery .. .. .	25	
Concrete floor for pigstye .. .. .	50	
Dismantling and removing piggery .. .. .	100	
Loss of use of metal road .. .. .	56	5
Fencing new cowshed .. .. .	78	
Danger of further erosion .. .. .	700	
	<u>£4,213</u>	

The Land Valuation Committee awarded a net sum of £1,234, made up as follows :

	£	
Loss of 8 acres of land at £70 per acre .. ..	560	
Depreciation in value of 6 acres outside stopbank at £35 per acre .. .. .	210	15
Concrete floor for pigstye .. .. .	50	
Dismantling and re-erecting pigstye .. .. .	100	
Loss of farm revenue .. .. .	824	
	<u>£1,744</u>	20

<i>Less :</i>	£	
Value of 3 acres, which would have been lost in any case, at £70 per acre .. .. .	210	
Value of 12 acres of accretion, at £25 per acre .. .. .	300	25
	<u>510</u>	
	<u>£1,234</u>	

From this decision both parties have appealed, but certain amounts 30 awarded by the Committee are now accepted by the parties and, accordingly, call for no further consideration. These are the following :

	£	
8 acres of land lost, at £70 per acre .. .. .	560	
Concrete floor for pigstye .. .. .	50	35
Removal and re-erection of pigstye .. .. .	100	
	<u>£710</u>	

The appeal by the River Board is limited to the two remaining items 40 in the award, while the claimant takes issue with the award in respect of all the items in the claim, with the exception of the three items agreed on as above stated.

We propose to consider the matters in issue under the following 45 headings :—

1. Depreciation of land now outside the stopbank.
2. Loss of revenue.
3. Loss attributable to the removal of the cowshed, calfshed, milking machinery and fencing, and the consequential loss of use of the roadway.
4. Value of accretion land.
5. Probable loss of land in any case, and possibility of further erosion.

We first think it desirable to point out, however, that, as we understand it, the effect of the judgment of the Court of Appeal is to entitle 55

the claimant to compensation in respect of loss of land and damage suffered in consequence of the works undertaken by the River Board for the straightening of the Manawatu River by the two cuts at Coley's Bend and Barber's Bend. We do not conceive that the claimant is entitled to compensation for loss or damage resulting from work previously undertaken by the River Board, and, in particular, for damage resulting from the erection of the original stopbanks on his property. We are of opinion that in the assessment of compensation we must treat the commencement of work on the Nos. 1 and 2 Cuts as the commencing point for our inquiry.

1. *Depreciation of land now outside the stopbank.* It is agreed that, as a result of the operations of the River Board, the course of the Manawatu River adjacent to the claimant's land was so changed as to cause the loss by erosion of eight acres of land, and to require the original stopbank to be set back five times and finally to be so placed that six acres of the claimant's land is now outside the stopbank, apart from the eight acres lost. The compensation to be awarded for the eight acres lost has been agreed on. The six acres outside the stopbank were held by the Committee to have been depreciated in value, on account of risk of flooding and loss of topsoil, from £70 to £35 per acre. We think that the allowance of £35 per acre for depreciation is reasonable, but the Board contends that depreciation should be allowed in respect of two acres only, as four acres of land was already outside the stopbank when the work on the Cuts was commenced.

The evidence confirms that the original stopbank cut off four acres of the claimant's land, and the claimant is not now entitled to compensation in respect of that area. It appears that this four acres was part of the eight acres lost by erosion, but, be that as it may, we think there is substance in the Board's contention that, if the plaintiff is paid at the rate of £70 per acre for all the land actually lost, he is entitled to depreciation only in respect of the difference between the six acres now outside the stopbank and the four acres which was outside the stopbank when the work on the Cuts commenced.

The award of £210 for depreciation to land will accordingly be reduced to £70, being in respect of two acres, at £35 per acre.

2. *Loss of revenue.* The claimant bases his claim for loss of revenue on the fact that the loss of his land was spread over a period of some six years before the date of his claim was made. He claims £1,274 for loss of revenue from the land during this period. In computing this alleged loss of revenue, the claimant's valuer assumed that erosion had proceeded steadily during this six years and assessed as loss of revenue the value of the butterfat which the land should have produced in that time if it had not been lost. In his computation, the valuer made no deduction for the cost of production, so that, in effect, the claimant asks for an amount equal to the gross revenue which could have been earned from the land up to the date of his claim, in addition to the value of the land itself.

In explanation of his disregard of the cost of production, the valuer contended that the claimant's farming costs would be substantially the same notwithstanding his loss of eight acres of land, and that, accordingly, no deduction should be made from his estimated gross revenue. We cannot believe that this is factually correct, particularly as the land was being farmed on a share basis, and the share-milker would have been entitled to his appropriate share of the gross revenue.

The Board contends that there is no justification for any allowance at all on account of loss of revenue in the circumstances of the present case.

In his argument before us, the claimant's counsel produced no authority for the proposition that loss of revenue may be claimed in addition to the value of the land lost, and we have been unable to find any such authority. Counsel founded his claim on the generality of the statutory provision for payment of "full" compensation, and upon the dictum of *Northcroft, J.*, in *Marshall v. Commissioner of Taxes* ([1953] N.Z.L.R. 335) where he said: "I think *O'Brien v. Chapman* ([1910] 29 N.Z.L.R. 1053) justifies the view that inasmuch as loss of revenue is a class of damage suffered by an exercise of the powers given by the Public Works Act, 1928, it may be awarded to a Claimant and, in appropriate cases, it would be reasonable to calculate it as interest" (*ibid.*, 359).

The reference to *O'Brien v. Chapman* relates to the proposition stated in that case that compensation is claimable under the Public Works Act for three things:

1. For land taken.
2. For land injuriously affected.
3. For damage suffered in the exercise of powers granted by the Act.

It was in relation to a claim under the third of these headings that *Northcroft, J.*, held that allowance could properly be made for what he described as "loss of revenue from the lapse of time between the taking and the payment of the value of the land" (*ibid.*, 359).

But, while it is true that the learned Judge thus gave his approval in terms to an award for loss of revenue, it is clear from the context that the revenue which was under consideration in *Marshall's* case ([1953] N.Z.L.R. 335) was that which the claimant might have expected to earn on his money had he been paid promptly for the loss of his land. This was explicitly stated in the judgment of *Finlay, J.*, where he held that an amount described in the award as "interest" was given to compensate the claimant for the loss of the income he might have received if he "had been paid as, ideally, he ought to have been paid, the value of his land at the moment it was taken out of his possession" (*ibid.*, 362). *Marshall's* case is, therefore, authority for the award of a sum of money to compensate a claimant for having to stand out of his compensation moneys pending the settlement of his claim. The sum awarded under this heading in *Marshall's* case was calculated as interest and described in the award as "interest on the compensation moneys." There is no suggestion in any of the judgments in that case that this sum was awarded, or might have been awarded, as the income which could have been earned by the land itself if it had not been taken.

Where the amount to be paid for the loss of the land itself has been determined, as has in this case been done by agreement, we are of opinion that nothing more may be claimed in respect of the land, save that an additional sum may be allowed to the claimant for having to wait for his money from the time the land was lost until the date of payment. The most convenient method of assessment of this further sum is as interest or by analogy to interest. The view that a direct claim for loss of revenue or profits as such cannot be sustained appears to be in accordance with the Canadian decision, *R. v. Irving Oil Co.* ([1946] 4 D.L.R. 625; [1945] Ex.C.R. 228), where it was held that, while an owner of expropriated property was entitled to compensation for the full value of his property, as measured by the fair market value at the date of expropria-

tion, and while the profits of a business might be taken into account in assessing the market value of the property, the owner was not entitled to claim an additional sum for loss of profits.

We hold, therefore, that the claim for loss of farm revenue is ill-founded and must be disallowed, but that the claimant is entitled to be compensated for the fact that his loss of land was spread over a period of six years before the date of his claim, and he has, in consequence, had to wait a considerable time for his money. It is impossible to assess precisely the interest or income which the compensation moneys might have earned during this period, but we propose to award a round sum of £150, which we consider to be equal to a generous allowance for interest, on this account.

3. *Loss attributable to the removal of the cowshed, calfshed, milking machinery and fencing, and the consequential loss of the road to the cowshed.*

These claims are all founded on the building of a new cowshed by the claimant for the reason, as he claims, that encroachment by the river had endangered his existing shed. The Board contended, and the Committee found, that the removal of the shed has been undertaken primarily for the claimant's own convenience, and the Committee allowed nothing under these headings.

We are satisfied that the new cowshed is very much superior to the old one, and that motives other than necessity contributed to the claimant's decision to move the shed. At the same time, it is clear that the encroachment of the river had been such as to justify concern as to the safety of the shed, and we have no doubt this was a factor which properly weighed with the claimant.

We are accordingly of opinion that something should have been allowed towards the costs of removing the cowshed, and incidental thereto. We propose to award a round sum of £300 on account of all the items under this heading.

4. *Value of accretion land.* This item relates to an area of some twelve acres of land situated in what was known as Barber's Bend, and originally part of the bed of the Manawatu River, but which in recent years, and due to the straightening of the river, has been forming an accretion to the claimant's land. The evidence shows that this area has already some grazing value and that there is good reason to suppose that in due course it will be of considerable value to the claimant, who should ultimately be able to obtain title thereto. The Committee on this account deducted £300 from the compensation awarded, being an allowance of £25 per acre for the twelve acres in question. There was some difference of opinion at the hearing as to the value of this area and considerable argument as to whether it should be made the subject of a deduction for betterment. We are of opinion that this land will ultimately become the property of the claimant or his successors and that it is of substantial value to him at the present time. It is to be remembered, however, that it will be some years before this land reaches its ultimate full value and that the claimant may be faced with considerable expense in obtaining a title thereto.

For these reasons, we feel that the Committee's allowance on account of the accretion of £25 per acre is a little high, and we propose to reduce the allowance to £20 per acre, and the deduction on this account to £240.

5. *Probable loss of land in any case, and possibility of further erosion.* Under this heading, we propose to discuss two separate issues. The first relates to three acres of the claimant's land, which it is said would have



been lost in any case had the work leading to the present claim not been undertaken. The Committee accepted the opinion of the Board's Engineer that this area would have been lost, and deducted its value at £70 per acre from the compensation awarded. The Committee refused, on the other hand, to make an allowance for possible further losses of land from the action of the river, though the claim included an item of £700 on this account. 5

The evidence suggests that the efforts of the Board to stabilize the Manawatu River in the vicinity of the claimant's property have been reasonably successful and that there is no reason to fear further serious damage to the claimant's land. It is nevertheless clear that there is no certainty that further land may not be lost, while this is the claimant's final claim for compensation. We think, therefore, that there is justification for the view that some small allowance should be made on account of the possibility of further erosion. The extent of this danger is a matter of opinion, as is also the question whether, and when, the three acres above mentioned would in any case have been lost. We think it is reasonable to offset these items against one another, and accordingly make no deduction on account of the three acres which may have been lost in any case, in consideration of the fact that some risk still remains of further loss or damage. 10 15 20

To sum up, the amounts which we propose to award, including those amounts already agreed on, are as follows :—

	£	
1. Loss of eight acres of land at £70 per acre .. ..	560	25
2. Injurious affection to two acres at £35 per acre .. ..	70	
3. Loss occasioned by removal of cowshed and incidental matters .. .. .	300	
4. Loss occasioned by removal and re-erection of pigsty .. .. .	150	30
5. Compensation for delay in payment for land lost .. ..	150	
	<hr/> £1,230	
Less :		
Present value of accretion land—twelve acres at £20 per acre .. .. .	240	35
	<hr/> £990	

Compensation as above is assessed as at August 15, 1950, the date the claim was lodged. 40

We are of opinion that, in addition to this sum, the claimant should receive interest from August 15, 1950, to date of payment. Interest until date of payment was allowed in *Marshall v. Minister of Works* ([1950] N.Z.L.R. 339 ; [1950] G.L.R. 20), and although the Court of Appeal in *Marshall v. Commissioner of Taxes* ([1953] N.Z.L.R. 335) was divided as to the propriety of an award of interest as such, it was apparently agreed that an amount calculated in the form of interest could properly be allowed as part of the compensation awarded. Interest has been awarded in a number of cases in the past, and we are of opinion that it is more convenient and just to direct the payment of interest until the date of payment than to attempt to achieve the same result by the addition of a lump sum to the compensation awarded. 50

A final question is as to whether the claimant should receive costs. The Committee allowed no costs, holding that the claimant had dis- 55

entitled himself to costs by the unreasonable amount of his claim. The Court is of opinion that in so far as the issues related to the quantum of compensation no costs should be allowed. The claim for £5,730 was, in our view, excessive and unreasonable, having regard to the agreed value of the land lost (£560) and to the total amount ultimately awarded (£990). It will be seen, moreover, that the River Board's appeal as to the quantum of compensation has been successful in part. It is, nevertheless, true, as contended by counsel for the claimant, that the substantial issue before the Committee and before the Court at its first hearing of the case was as to legal defences raised by the Board on which the claimant has ultimately proved successful. The hearing before the Committee and the original hearing before this Court were lengthy hearings and were concerned in the main with the difficult question whether the claim was in time. Having ultimately succeeded on this major issue, we are of opinion that the claimant is entitled to an allowance towards his costs in respect of these hearings.

The decision of the Court is accordingly :

- (1) That the claimant be awarded the sum of Nine Hundred and Ninety Pounds (£990) as compensation.
- (2) That he be awarded interest on this amount at  $4\frac{1}{2}$  per cent. from August 15, 1950, to date of payment.
- (3) That the claimant be allowed the sum of One Hundred Guineas (£105) towards his costs, together with the sum of Fifty Pounds (£50) towards his witnesses' expenses.

Solicitors for the claimant : *McGregor and McBride* (Palmerston North).

Solicitors for the respondent : *Oram and Yortt* (Palmerston North).

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## LOWER HUTT CITY CORPORATION v. DYKE.

LAND VALUATION COURT. Wellington. 1953. November 4, 5, 6,  
30. ARCHER, J.

*Land Valuation—Land Suitable for Industrial Purposes—Land taken compulsorily—Proper Method of Valuation—Compensation for Disturbance or Reinstatement allowable—Allowance for Value of Buildings and Improvements to be removed from Subdivision of Land for Industrial Purposes—Topsoil—Demand therefor a Factor for Consideration—Amount allowable for Value of Topsoil in addition to Amount allowed for Land—Land Valuation Act, 1948, s. 28—Finance Act (No. 3), 1944, s. 29.*

The soundest method of valuing an area of land, which appears to be capable of realization to the best advantage by subdivision and sale in separate sections, is that which arrives at the present value of the land by assessing the value of the sections in a hypothetical subdivision and deducting from the gross total the estimated cost of roading and subdivision, including an allowance for risk and for profit. When this method is applied to the valuation of land taken compulsorily, the allowance for profit should be strictly limited.

Section 29 of the Finance Act (No. 3), 1944, is not intended to debar a claim for compensation, in appropriate circumstances, for disturbance or reinstatement; but a person dispossessed of land by compulsorily taking is bound to minimize his loss by virtue of disturbance and his cost of reinstatement, so far as may be reasonable and possible in the circumstances.

An area of about 6 acres of land in Lower Hutt City, without road access, was taken by the appellant Corporation under the Public Works Act, 1928, to provide the access road to a new river bridge. The land was available as immediate subdivision for industrial use; and the principal matters in issue concerned its value for that purpose. The land had been used by the respondent for many years for the training, stabling, and breeding of trotting horses; an old house and stable were erected on it; and it was fenced. The respondent's claim for compensation was heard by the Land Valuation Committee, which awarded him the sum of £29,282 10s. On appeal from that determination,

*Held*, 1. That the Corporation was not entitled to take the respondent's land at a price which would enable it to make a substantial profit in its undertaking.

2. That, in assessing the value of land, regarded as available for immediate subdivision for industrial purposes, the old house, stables, and fencing upon it would have to be removed and demolished; and £1,500 would be a proper amount to be allowed as a reasonable additional sum to be paid by a purchaser on account of the buildings and other improvements.

3. That a proper assessment of the value of the land must be assumed to cover the land as it stands and to include the soil thereon; but, in view of the demand for topsoil, which may be a factor making the land more attractive to certain purchasers, a further £1,500 should be added to the amount allowed for the land.

4. That the sum to be awarded as compensation should be £23,400.

APPEAL against an award of compensation made by the Wellington Land Valuation Committee in favour of the respondent John Vincent Dyke in respect of an area of some 6 acres of land taken by the appellant Corporation under the Public Works Act, 1928, for the purpose of a roading scheme and to provide the access road to a proposed new bridge over the Hutt River. The land was situated in Lower Hutt, between High Street and the river, and was back land without road access. Mr. Dyke, however, had access to this land through a section he owned in High Street, which was not included in the land taken but through which he would have been able, had he so desired, to construct an access road

into the area taken. By this means, it would have been possible for Mr. Dyke to sell his back land in one or more sites for industrial use, for which it was zoned and eminently suitable. The back land had been utilized by the respondent for many years for the training, stabling, and breeding of trotting horses, and contained a banked trotting track and and old house and stable.

This area was taken by the appellant by Proclamation dated October 29, 1951, and a claim for £46,450 compensation was lodged in due course. The Corporation did not admit the claim and the Court was advised that no offer was at any time made in settlement. The claim was heard by the Land Valuation Committee in August, 1953, when the following award was made:

			£	s.	d.
	(1) Land taken (at £4,000 per acre) .. ..	23,307	10	0	
15	(2) House .. ..	1,000	0	0	
	(3) Stables .. ..	1,000	0	0	
	(4) Fencing .. ..	200	0	0	
	(5) Soil .. ..	2,175	0	0	
	(6) Reinstatement and temporary loss of earnings .. ..	1,500	0	0	
20	(7) Expenses of moving .. ..	100	0	0	
	Total .. ..	£29,282	10	0	

25 In addition, the respondent was allowed £155 costs.

From this award, the Corporation brought this appeal. It was agreed at the hearing that the land was eminently suitable for industrial use, and the principal matters in issue concerned its value for that purpose. The sums awarded in respect of the house, stables, and fencing were not disputed as to amount, but it was submitted by the appellant that, if the land were devoted to industrial purposes, the buildings and fencing would have to be sacrificed and that compensation should be allowed only on a reduced or a demolition value. There was a contest as to the award of £2,175 for soil, on the basis that the respondent could have sold soil for removal from the land without reducing its sale value for industrial purposes. There was also a contest as to the allowance of £1,500 for "reinstatement and temporary loss of earnings." As to this item, the relevant claim was for £2,300 and was therein described as for "goodwill of horse training business." For the purposes of the appeal it was agreed that the item be regarded as a claim for "disturbance and reinstatement." No claim was pursued on account of loss of goodwill.

*Gillespie and Relling*, for the appellant.

*Cleary and Beere*, for the respondent.

*Cour. adv. vult.*

The judgment of the Court was delivered by

ARCHER, J. [After stating the facts, as above:] The major portion of the evidence related to the value of the land itself. The assessment of its value presented considerable difficulty, because of the great demand for industrial sites in the Hutt Valley and the phenomenal increase in the prices paid for such sites following the removal of Land Sales control, and because of the characteristics of the land and its lack of road access. A number of experienced valuers gave evidence, and

gave to the Court their reasons for ascribing to the land a value ranging from £5,000 per acre in the case of the highest valuer for the respondent down to a little over half that amount in the case of the lowest valuer for the Corporation. A great number of sales were cited, and alleged to be comparable and relevant, and the Committee fixed the value of the land as £4,000 per acre and made its award accordingly. 5

We have given careful consideration to the evidence of the respective valuers, but it is not our intention to traverse the evidence in detail or to comment on the individual sales in the Hutt Valley which were referred to. As the opinion of a valuer is properly dependent upon the according of proper weight to a great number of considerations, so the opinion of the Court as to the reliability of a valuer's evidence is dependent on a great many factors which it would be difficult to enumerate or define. Valuation is particularly difficult when, as in this case, the principal sales which were cited by way of comparison were of land situated some distance from the area in question, or of sections differing substantially in area, access, convenience in relation to transport and to labour, and in other respects. We feel it necessary to remark, however, that the principal valuer for the respondent placed too great reliance upon a comparison of the prices per acre paid for small areas of industrial land in widely differing situations and circumstances. We are of opinion that the conversion to a per-acre rate of the prices paid for small sections affords no useful basis for assessing the value of areas several acres in extent, particularly when such areas are deficient in road access. 10 15 20

Our experience as a Valuation Court leads us to suppose that the soundest method of valuing an area of land which appears to be capable of realization to the best advantage by subdivision and sale in separate sections is that which arrives at the present value of the land by assessing the value of the sections in a hypothetical subdivision and deducting from the gross total the estimated cost of roading and subdivision, including an allowance for risk and for profit. When this method is applied to the valuation of land taken compulsorily, the allowance for profit should, of course, be strictly limited. The valuers called by the Corporation made a more convincing and logical assessment of the value of the land in question by reference to its subdivisional possibilities than did the valuers for the respondent, and to that extent we are disposed to give greater weight to their opinions. 25 30 35

Although the Committee does not state precisely its grounds for valuing the land at £4,000 per acre, it would appear that it was considerably influenced by the view that the Corporation could make a substantial profit on its proposed subdivision, after payment of that amount. In this regard the following appears in the Chairman's Report:— 40

At the hearing, however, a subdivision plan was produced by the Council showing that it contemplated the sale of some 27 or 28 light industrial sites fronting the new road, which is to occupy only 1½ acres out of the total of nearly 6 acres. 45

The Engineer's evidence and the evidence of all the Valuers for, both sides convinced the Court (*sic*) that the Council would still be some thousands of pounds in pocket after paying the figure awarded by the Committee and all the cost of roading, which, in this case, is 10 chains at £600 per chain, or £6,000. 50

Being so convinced, it would seem to follow that the Committee's award of £4,000 per acre, or £23,307 10s. was not only justified but conservative, and this Court would not countenance any reduction of the award if it were satisfied that the Committee was justified in finding that the Corporation could pay that sum and still make a substantial 55

profit on its undertaking. Unfortunately, however—and in fairness to the Corporation we are bound to make this very clear,—there was no evidence in the case as presented to us to justify such a conclusion. The evidence showed that the plan which provided for a subdivision of some twenty-seven sites was that of a hypothetical subdivision, which Mr. Dyke could have carried out had he so desired by using his adjoining section in High Street as a means of access to his back land. This plan had no relation to the Council's actual proposals, which contemplated an entirely different subdivision with no access to High Street, but providing access to the new Melling Bridge. No subdivisional plan was produced in connection with the Corporation's scheme and no valuer on either side attempted to value the sections which the Corporation would have to sell. The only evidence on this point was given by the City Engineer who gave no precise figures, but said he hoped that, if the Council could acquire the land at a figure in the vicinity of that quoted by its own valuers, it might "break even" or come out of the transaction with a small profit.

There was, accordingly, no agreement by the valuers, nor was there, indeed, any attempt by the respondent to prove that the Corporation could pay £4,000 per acre for the land and still make a substantial profit on the transaction. The evidence of Mr. Renner, who produced the plan referred to in the Committee's Report, was that, upon the basis of his hypothetical subdivision into twenty-seven sections, the present value of the land was £15,623, or less than £2,700 per acre. We have traversed this aspect of the matter in some detail as we desire it to be quite clear that we do not subscribe to the view that the Corporation is entitled to take the respondent's land at a price which will enable it to make a substantial profit upon its undertaking.

In the absence of evidence as to what the Corporation may expect to realize from the resale of its surplus land, we think the evidence of Mr. Renner as to the subdivisional scheme which Mr. Dyke could have undertaken if the land had been left in his hands is the most convincing method of assessing its value. Mr. Renner's calculations, as already stated, gave a value of £15,623 for the land as a block. It emerged from a consideration of his figures, however, that he had over-estimated certain items of outlay, and that his estimate of the selling value of sections might be a little low, having regard to the great demand for industrial sites in Lower Hutt and the scarcity of such sites. We are in duty bound, moreover, to give due weight to the opinions of the other valuers, who had in some cases placed much higher values upon the land, although, in our opinion, unable to justify such values in their entirety. Having regard to all relevant factors, we are of opinion that the valuation of £4,000 per acre accepted by the Committee was too high, and that the value of the land per acre should be reduced to £3,250.

In so assessing the value of the land, we have regarded it as available for immediate subdivision for industrial purposes. It is obvious that the old house, stables, and fencing are of little value for such purposes, and would almost certainly have to be removed or demolished. We do not think a purchaser would pay the amount which we have allowed for the land and, at the same time, pay full value for the buildings and fencing as fixed by the Committee at £2,200. We conceive, however, that a purchaser would pay a reasonable additional sum on account of buildings and other improvements, and we think that £1,500 would be a proper amount to allow on this account.

Next in dispute is the award of £2,175 for soil. In the claim, as

originally presented, it was alleged that 17,400 cubic yards of topsoil could be removed and sold at 10s. per yard, without diminishing the value of the land. At the hearing, there was considerable evidence as to the demand for topsoil, and as to a practice carried on by contractors of purchasing sections with a view to selling the soil therefrom and then disposing of the land at substantially the price originally paid for it. No case was instanced, however, of a vendor first selling the topsoil and then being able to dispose of the denuded land at the same price as if sold with the soil. Nor was any instance cited of so large a quantity of soil being removed in a short time from a single area, or proof given that any person would be prepared to buy and remove so great a quantity of soil within a reasonable time. We are by no means satisfied that the respondent could have disposed of any great quantity of topsoil from his land, while, at the same time, disposing of the land itself for the amount which we are prepared to award. It is possible that some of those interested in the purchase of industrial sites might have regard to the availability of soil for sale, and might, on this account, pay something more for the land than they would otherwise offer. This is much in the realms of speculation, and we feel that in principle a proper assessment of the value of the land must be assumed to cover the land as it stands and to include the soil thereon. In view, however, of the demand for topsoil which may be a factor making the land more attractive to certain purchasers, we propose to add a further £1,500 to the amount allowed for the land.

The remaining subject of serious contest was the award of £1,500 for reinstatement and loss of earnings. We are satisfied that the respondent has operated in a fairly substantial way and for a long period as a trainer and breeder of trotting horses on this land. He says that these operations have been seriously disorganized as a result of the taking of the land. He has now acquired premises at Levin to which he is moving his establishment, but he claims that his training and breeding activities have been practically at a standstill for twelve months with consequent loss of earnings and heavy costs of removal. It was contended by the appellant that, since the amending provisions of s. 29 of the Finance Act (No. 3), 1944, it was no longer competent for us to award compensation for disturbance or reinstatement. These were recognized heads of compensation before the Amendment mentioned, and we do not think that the amendment was intended to debar a claim in appropriate circumstances upon these grounds. We are of opinion, however, that a person dispossessed of land by compulsory taking is in duty bound to minimize his loss by virtue of disturbance, and his cost of reinstatement, so far as may be reasonable and possible in the circumstances. We think it would have been possible for the respondent in the present case to arrange with the Corporation to retain possession and to carry on his trotting operations until he was in a position to transfer his establishment elsewhere. The respondent has, in fact, remained in occupation and control of the property until the present time, and we see no reason why he should not have carried on his business in the meantime. It is nevertheless true, however, that the respondent will be put to considerable expense by reason of the enforced removal of his establishment and the disturbance of his operations, and, while we must be fair to both parties, we should not be niggardly in the assessment of compensation to an owner who is dispossessed of his land. For these reasons and although the respondent's evidence as to the losses in respect of which the Committee awarded him £1,500 was deficient in detail, we do not propose to reduce

the amount awarded. We think, however, that the sum of £1,500 allowed should be deemed to cover the claim for removal expenses.

In the result, the appeal is allowed and the sum awarded reduced to the following :—

		£
5	1. For land taken—	
	(a) 5 ac. 3 r. 12.3 p. at £3,250 per acre, say	18,950
	(b) Allowance for buildings and fencing ..	1,500
	(c) Allowance for topsoil .. ..	1,500
10	2. For Disturbance and Reinstatement .. ..	1,500
		<hr/> £23,450 <hr/>

15 The Committee's award to the respondent of costs amounting to £155 in respect of the original proceedings will be reduced, having regard to the result of this appeal, to £100. No further costs will be allowed to either party on the appeal.

*Appeal allowed.*

Solicitors for the appellant: *Hogg, Gillespie, Carter, and Oakley* (Lower Hutt).

Solicitors for the respondent: *Beere and Riddiford* (Wellington).

[IN THE SUPREME COURT.]

ARCUS AND OTHERS *v.* CASTLE AND OTHERS AND  
WELLINGTON HOSPITAL BOARD.

SUPREME COURT. Wellington. 1953. August 27, 28; September 3.  
GRESSON, J.; HAY, J.

*Hospitals—Hospital Board—Requisition for Special Meeting—Right to Requisition given by Statute and not by Standing Orders—Non-compliance with Standing Order as to stating Place of Meeting not invalidating Requisition calling Special Meeting—Board entitled to consider, for Third Time, Question whereon Board evenly divided twice previously—By-law providing Chairman's Decision on Point of Order Final—Such By-law operating to make Chairman's Order Final only on Conduct and Control of Debates—Chairman's Determination at Outset that Meeting not validly called not Point of Order—Chairman, by taking Chair, recognizing Meeting validly called—Hospitals and Charitable Institutions Act, 1926, s. 30.*

The right to requisition for a special meeting of a Hospital Board is conferred by s. 30 of the Hospitals and Charitable Institutions Act, 1926, and not by standing orders (made pursuant to s. 41 thereof), which do no more than provide the machinery, and which should not be interpreted as so mandatory in character as to limit the statutory right conferred by s. 30.

*Thomson v. Stevenson* ([1916] N.Z.L.R. 963; [1916] G.L.R. 645) distinguished.

Non-compliance with the requirement of a standing order as to stating the place of meeting does not invalidate a requisition calling a special meeting of a hospital board.

*Howard v. Boddington* ((1877) 2 P.D. 203) applied.



A standing order provided as follows :—

"If a motion duly proposed and put to the Board shall be rejected by the Board, no notice of any other motion which, in the opinion of the Chairman, is substantially the same in purport and effect as the rejected motion, shall be again entered upon the Order Paper for the space of six calendar months, unless such notice shall be signed by at least five members of the Board."

It cannot be regarded as improper, or as having any element of obstruction, to invite the Board a third time to consider a question upon which it had twice previously been evenly divided, and the question had been decided only on the casting vote of the chairman.

Another Standing Order, No. 52, which provided as follows,

"The Chairman shall maintain order and any member refusing to obey the orders of the Chair shall be deemed guilty of contempt. The Chairman's decision on any point of order shall be final,"

operated to make the Chairman's decision final only in regard to the conduct and control of debates. It is not a point of order within the meaning of that Standing Order to determine at the outset whether or not a meeting at which the members have assembled has been validly called. The Chairman, by taking the chair, recognizes that the meeting has been validly called.

*R. v. Foley* ([1928] V.L.R. 1) referred to.

This action arose out of sharp conflict of opinion between members of the Wellington Hospital Board resulting from the action of the Medical Superintendent-in-Chief (Dr. R. W. Durand) in tendering his resignation. He was appointed to the position in 1950 upon terms which provided, *inter alia*, that the appointment should be terminable by six months' notice on either side. On January 19, 1953, he tendered his resignation to take effect in six months. At the regular Board meeting on January 29, 1953, after some discussion, and after an amendment that consideration of the matter be adjourned until the next meeting had been rejected, a resolution was passed that the resignation be accepted. This resolution was carried by nine votes to eight. One member of the Board was absent. At the next regular meeting of the Board, on February 26, 1953, a resolution was moved for the rescission of the resolution passed at the meeting of January 29 accepting the resignation. Upon this motion being put, there was an equal division of the Board members present, nine supporting the motion and nine opposing. The Chairman gave a casting vote against the motion. At the next regular meeting of the Board, on March 26, 1953, a motion was again moved for the rescission of the motion which had been passed on January 29 accepting the resignation. Again there was an equal division of the Board, nine for and nine against the motion; again it was lost on the casting vote of the Chairman.

On April 15, 1953, at 4 p.m. there was delivered to the Secretary a notice (signed by nine members of the Board) requisitioning a special meeting of the Board to be held on April 23, at 7.30 p.m. at which, *inter alia*, a resolution would be moved inviting Dr. Durand to withdraw his resignation.

On the same day, after 5 p.m., the Secretary caused to be posted a notice to all members of the Board setting out the requisition, and stating below that the meeting would be held "at the time and date stated above, in the Board Room, Wellington Hospital". Seventeen members assembled for the meeting, one being absent from New Zealand. The Chairman in opening the meeting read a legal opinion which stated that the meeting was not in order in three respects: First, the requisition calling the meeting did not indicate the place of meeting; secondly, seven clear days' notice of intention to hold the meeting had not been given; thirdly, the motion was similar in all respects to motions already disposed of.

The Secretary recorded: "After concluding the reading of the opinion the Chairman ruled that, for the foregoing reasons, the meeting was out of order and declared the meeting closed . . ." When this was submitted as proposed minutes of the meeting, the Chairman refused to have it confirmed in that form, and moved a motion for amendment, which was carried on his casting vote, effecting an alteration so that the minutes would read: "after concluding the reading of the opinion the Chairman stated 'I therefore rule the calling of the meeting irregular, the Notices of Motion substantially the same in purport and effect as the previously rejected motions and therefore out of order'; and he declared the meeting closed at 7.38 p.m."

Before the Chairman had left the chair, one member challenged the Chairman's ruling and moved that the Chairman leave the chair and that another named member take his place while the Chairman's action was discussed. This motion was seconded; but it was ignored by the Chairman, who vacated the chair and left the room accompanied by seven other members. Nine members remained (constituting a quorum of the Board). They appointed a Chairman and passed unanimously a resolution to the effect that the Board rescind its decision to accept the resignation of Dr. Durand, and subsequently a further unanimous resolution that Dr. Durand be asked to withdraw his resignation.

Dr. Durand, who was present at this as at all meetings of the Board, was then asked whether he would be prepared to withdraw his resignation. He agreed to do so, and handed to the Chairman of the meeting in writing a withdrawal of his resignation as submitted on January 19. A further unanimous resolution was thereupon passed that the Board accept the withdrawal of the resignation.

In an action by the plaintiffs, suing on behalf of nine members of the Board, against the Chairman (sued on behalf of himself and seven members of the Board) as first defendant, and against the Board itself as second defendant, for a declaration that the resolutions passed at the special meeting of the Board held on April 23 were valid; and a declaration that by virtue thereof the resignation of Dr. Durand had been withdrawn and the withdrawal assented to, and that it was therefore no longer operative, consequential injunctions being sought against the defendants.

*Held*, 1. That the Chairman recognized the meeting as valid by taking the chair, and then, in exercise of his authority as Chairman, he declared the meeting closed, on the basis that it had not been validly called; and the stage was never reached at which he would have been invested, by virtue of Standing Order 52, with authority to control the business.

2. That, as the Chairman's action in peremptorily declaring the meeting at an end and leaving the room was not justified, it was competent for the meeting to go on with the business for which it had been convened and to appoint another Chairman for this purpose.

*National Dwellings Society v. Sykes* ([1894] 3 Ch. 159).

3. That all the resolutions adopted by the meeting were within its competence, and, as such, were binding on the Board.

4. That it was competent for the Board during the pendency of the six months' notice of the resignation of the Superintendent-in-Chief to invite that officer to withdraw it; and, upon his doing so, to resolve formally to accept the withdrawal; and the resignation ceased to have any effect upon the passing of the resolutions at the special meeting of the Board on April 23, 1953.

ACTION by the plaintiffs, suing on behalf of nine members of the Wellington Hospital Board, against the Chairman (sued on behalf of himself and seven other members of the Board) as first defendant, and against the Board itself as second defendant. One member of the Board being absent from New Zealand was not made a party to the proceedings. An Order was made on the application of the plaintiffs that the first-named defendant, Mervyn Athol Castle, represent the other persons on whose behalf he was sued and that he defend the action on their behalf. The plaintiffs sought a declaration that the resolutions passed at the special meeting of the Board held on April 23, were valid; and a declaration that by virtue thereof the resignation of Dr. Durand had been withdrawn and the withdrawal assented to and that it was therefore no longer operative. Consequential injunctions were sought against the defendants.

15 At the hearing, it was intimated by counsel for the Board that he proposed to call no evidence nor to take part in the argument, but to submit to the judgment of the Court.

This action arose out of a sharp conflict of opinion between members of the Wellington Hospital Board resulting from the action of the Medical

Superintendent-in-Chief—Dr. R. W. Durand—in tendering his resignation. He had been appointed to the position in 1950 upon terms which provided (*inter alia*) that the appointment should be terminable by six months' notice on either side. On January 19, 1953, at a meeting of the House Committee, there was some criticism regarding some of the officers following which Dr. Durand left the meeting and returned a few minutes later when he handed to the Acting-Secretary a letter which read :

I hereby tender my resignation.

From recent deliberations it is obvious that the Board does not need a Superintendent-in-Chief, except to criticise. As you are aware, I have to give six months' notice of my resignation and I shall therefore request that the resignation take effect from six months' today.

The letter was placed before the meeting which resolved that it be "received and referred to the Board." At the regular Board Meeting on January 29, 1953, after some discussion, and after an amendment that consideration of the matter be adjourned until the next meeting had been rejected, a resolution was passed that the resignation be accepted. This resolution was carried by nine votes to eight. One member of the Board was absent. At the next regular meeting of the Board, on February 26, 1953, a resolution was moved for the rescission of the resolution passed at the meeting of January 29, accepting the resignation. Upon this motion being put, there was an equal division of the Board members present, nine supporting the motion and nine opposing. The Chairman gave a casting vote against the motion. At the next regular meeting of the Board, on March 26, 1953, a motion was again moved for the rescission of the motion which had been passed on January 29 accepting the resignation. Again there was an equal division of the Board, nine for and nine against the motion ; again it was lost on the casting vote of the Chairman.

On April 15, 1953, at 4 p.m., there was delivered to the Secretary a notice (signed by nine members of the Board) which read :

Notice is hereby given that a special meeting is requisitioned to be held on Thursday, April 23rd, at 7.30 p.m. whereat the following resolutions will be moved—

(a) That in view of the Board's recent findings that there was no substance in the allegations of intimidation and its congratulations on the conduct of the Silverstream Hospital, that the Board rescind its decision to accept the resignation of Dr. R. W. Durand.

(b) That Dr. Durand be invited to withdraw his resignation.

NOTE :—It is proposed that the above motions be discussed with the Board in Committee.

In accordance with this notice, the Secretary caused to be posted shortly after five o'clock that evening a notice to all members of the Board in the following terms :

Please note that I have received the following :—

"Notice is hereby given that a special meeting is requisitioned to be held on Thursday, April 23rd, at 7.30 p.m. whereat the following resolutions will be moved—

(a) That in view of the Board's recent findings that there was no substance in the allegations of intimidation and its congratulations on the conduct of the Silverstream Hospital, that the Board rescind its decision to accept the resignation of Dr. R. W. Durand.

(b) That Dr. Durand be invited to withdraw his resignation.

NOTE :—It is proposed that the above motions be discussed with the Board in committee.

(Signed) W. J. Arcus,

B. A. Logie,

Robt. J. Archibald,  
A. H. Carman,  
John Purvis,  
Jas. Cumming.

E. E. Fraser,  
M. Dowse,  
J. Fleming."

- 5 In accordance with Standing Order No. 11, this meeting will be held at the time and date stated above, in the *Board Room*, Wellington Hospital.

Seventeen members assembled for the meeting, one being absent from New Zealand. The Chairman, in opening the meeting, read a legal opinion which stated that the meeting was not in order in three respects—first, 10 the requisition calling the meeting did not indicate the place of meeting; secondly, seven clear days' notice of intention to hold the meeting had not been given; thirdly, the motion was similar in all respects to motions already disposed of.

- There is some difference of opinion as to what happened then. Mr. 15 Cook, the Secretary of the Board, who was called as a witness, had recorded:

After concluding the reading of the opinion the Chairman ruled that, for the foregoing reasons, the meeting was out of order and declared the meeting closed.

- But, when this was submitted as proposed minutes of the meeting, the 20 Chairman refused to have it confirmed in that form and moved a motion for amendment which was carried on his casting vote effecting an alteration so that the Minutes would read:

- After concluding the reading of the opinion the Chairman stated—"I therefore rule the calling of the meeting irregular, the Notices of Motion substantially the same in purport and effect as the previously rejected motions and therefore out 25 of order" and declared the meeting closed at 7.38 p.m.

- Before the Chairman had left the chair, one member challenged the Chairman's ruling and moved that the Chairman leave the chair and that another named member take his place while the Chairman's action was 30 discussed. This motion was seconded but was ignored by the Chairman who vacated the chair and left the room accompanied by seven other members. Nine members remained (constituting a quorum of the Board); they appointed a Chairman and passed unanimously a resolution:

- (a) That in view of the Board's recent findings that there was no substance in the allegations of intimidation and its congratulations on the conduct of the Silver- 35 stream Hospital, that the Board rescind its decision to accept the resignation of Dr. R. W. Durand.

And subsequently a further resolution:

(b) That Dr. Durand be invited to withdraw his resignation.

- 40 Dr. Durand, who was present at this as at all meetings of the Board, was then asked whether he would be prepared to withdraw his resignation. He agreed to do so, and handed to the Chairman of the meeting in writing a withdrawal of his resignation as submitted on January 19. A further unanimous resolution was thereupon passed that the Board accept the 45 withdrawal of the resignation.

*Wild*, for the plaintiffs.

*Shorland*, for the first defendant.

*Watts*, for the second defendant.

*Cur. adv. vult.*

The judgment of the Court was delivered by

- 50 GRESSON, J. The main question to be determined is whether the meeting of April 23—which the Chairman declared to be irregular—was invalid. It is contended on behalf of the first defendant that it had not

been legally convened. The first ground urged is that, inasmuch as the requisition did not specify the place of the meeting, it was not in compliance with the Board's Standing Orders and that the defect vitiated the meeting which was called in pursuance thereof. The calling of such a special meeting is provided for by Standing Order 11 which is as follows : 5

(a) The Board may at any time hold a special meeting, to be called either upon a resolution of the Board or upon a requisition in writing delivered to the Secretary and signed by the Chairman or by any five members, specifying the time and place at which such meeting is to be held and the business to be brought before the same.

(b) Notice in writing of the time and place of such meeting and of such business shall be posted by the Secretary to every member of the Board at least three clear days before the day appointed for such meeting. No business shall be transacted except that specified in the notice calling the meeting except with the unanimous consent of such meeting. 10

With those provisions should be read those of Standing Order 30—namely, 15

Any resolution of a meeting of the Board may be revoked or altered:—

(a) At the same meeting by the unanimous vote of the members present when it was passed;

(b) At a subsequent meeting by the vote of the majority of the members present at such subsequent meeting; provided that notice of such subsequent meeting and of the proposal to revoke or alter such resolution shall be posted to each member at least seven clear days before such subsequent meeting. 20

The requisition did not specify the place at which the meeting should be held but, in our opinion, this omission was not fatal to the validity of the notice. Counsel for the first defendant relies upon the decision of *Sim, J., in Thomson v. Stevenson* ([1916] N.Z.L.R. 963; [1916] G.L.R. 645). This was an appeal from the decision of a Stipendiary Magistrate upon an information alleging intent to avoid paying toll. The Municipal Council had purported to establish a toll gate at a bridge over a stream. 30 It had taken all the steps for making the special order prescribed by s. 65 of the Municipal Corporations Act, 1908, except that the resolution under which the special meeting was convened did not specify the place at which the meeting was to be held. The learned Judge held that the concluding words of subs. (1) of s. 64 of that Act—"time and place at 35 "which such meeting is to be held" applied both to the resolution and to the requisition mentioned in the subsection; and that a resolution to comply with such subsection must specify the time and place at which the meeting was to be held and, therefore, the special order subsequently made was invalid; that compliance with the terms of both subsections was a condition precedent to the existence of a right to demand tolls. 40

This was, therefore, a case where the validity of a Special Order depended upon the efficacy of the resolution which preceded it. The statute was interpreted as requiring strict compliance with its terms which included the naming of the place of meeting equally in a resolution to call a special meeting as in a requisition for such a special meeting. The language of the section was imperative in expression and was held to be so in intention also. It was an application of the rule that, where the Legislature definitely commands certain things to be done in language which is imperative—that is, mandatory—and where, as well, it gives 50 directions as to the form in which what it has authorized to be done shall be done, that properly can be held to be mandatory. But, in our opinion, that principle has no application here. The case with which we are concerned is one where the right to requisition for a special meeting is conferred by the statute and not by the Standing Orders which do no 55 more than provide the machinery.

Section 30 of the Hospitals and Charitable Institutions Act, 1926, provides in regard to ordinary and special meetings of the Board—

- (1) Meetings of the Board shall be held at such times and places as the Board from time to time appoints.
- 5 (2) The Chairman of the Board, or any five members thereof, may at any time call a special meeting of the Board.
- (3) It shall be the duty of the Secretary or Chairman of the Board to call a special meeting of the Board at any time when requested so to do by a requisition in writing under the hands of any five members of the Board.
- 10 In our opinion, Standing Orders (made pursuant to s. 41 of that Act which provides that the proceedings of the Board and of its Committees “shall be governed by such regulations not inconsistent with this Act “as are made by the Board from time to time”) should not be interpreted as so mandatory in character as to limit the statutory right conferred by s. 30. Even where imperative language is used in a statute, there are cases where the Court, looking at the whole purpose of the Act and at other sections which throw light on the intention of the Legislature and the inconvenience which might result from interpreting them as mandatory, has held that what is imperative in terms is not imperative in intention. What, therefore, has to be considered in this case is whether a strict compliance with the Standing Order is obligatory. The Standing Orders carry the matter further than the statute. The right and the procedure are governed by a combination of statute and Standing Order. It is this combination of enactments that has to be considered.
- 25 Applying to that combination the criterion formulated by *Lord Penzance* in *Howard v. Bodington* (1877) 2 P.D. 203, 211 of looking to the subject-matter, considering the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and reviewing the case in that aspect to arrive at a decision whether the enactment is what is called imperative or only directory, we do not think the requirement as to stating in the requisition the place of meeting (as included in Standing Order 11) to be such that a neglect to do so invalidates the requisition. It is difficult to see what good purpose the requirement as to place has. It can hardly be that the requisitionists are free to name any place, *e.g.*, Palmerston North, as the place where the meeting is to be held. We are accordingly of opinion that non-compliance with this particular requirement in Standing Order 11 did not invalidate the requisition.

No objection is taken to the form of notice sent out by the Secretary of the Board, and before this Court it was admitted that the posting of the notices later upon the day upon which the requisition was received complied with the Standing Orders as to the length of time for the notice to be given. It is, however, submitted that it was not competent for the Board to entertain a third successive motion to rescind the motion which had accepted Dr. Durand's resignation. This contention is based upon Standing Orders 2(d), 30, 31 and 40. Standing Order 2(d) provides :

- (d) Any resolution of a meeting of the Board may be revoked or altered :
- (1) At the same meeting by the unanimous vote of the members present when it was passed.
- 50 (2) At a subsequent meeting by the vote of the majority of the members present at such subsequent meeting ; provided that notice of such subsequent meeting and of the proposal to revoke or alter such resolution shall be given to each member seven days at least before such subsequent meeting.

Standing Order 30 is to the same effect except that it requires the notices to be “posted”. Standing Order 31 provides :

No notice of motion to rescind a resolution of the Board shall constitute a stay of proceedings upon such resolution unless such notice shall be signed by at least five members of the Board. The Chairman shall decide whether such notice of motion shall be discussed at the next ordinary meeting or at a special meeting to be called before such ordinary meeting.

and Standing Order 40 provides :

If a motion duly proposed and put to the Board shall be rejected by the Board, no notice of any other motion which, in the opinion of the Chairman, is substantially the same in purport and effect as the rejected motion, shall be again entered upon the Order Paper for the space of six calendar months, unless such notice shall be signed by at least five members of the Board.

It is argued that Standing Order 40 does not apply to a motion to rescind a motion previously passed ; that, if it did, it would be competent for a minority of five members by giving successive notices to frustrate the conduct of the Board's business since by implication such a notice constitutes a stay of proceedings under Standing Order 31. We do not think it is justifiable to limit the operation of Standing Order 40 in this way. If it is the case that the Standing Orders permit of a minority of five so acting as to obstruct the Board's administration, a way could be found to meet the situation. It would always be practicable for application to be made to the Court to restrain members whose conduct was an abuse of the procedure. It cannot, we think, be regarded as improper or as having any element of obstruction to invite the Board a third time to consider a question upon which the Board had been so evenly divided on each of the two former occasions that the question had been decided only upon the casting vote of the Chairman. We hold accordingly that the third ground upon which the Chairman ruled the meeting out of order was not a valid ground.

But it is contended that, whether the Chairman's grounds for ruling the meeting irregular were well founded or not, his decision was final by virtue of Standing Order 52. This Standing Order is the first of a series of Standing Orders introduced under the heading " Part III. Conduct of Debates," and it provides :

The Chairman shall maintain order and any member refusing to obey the orders of the Chair shall be deemed guilty of contempt. The Chairman's decision on any point of order shall be final.

In our opinion, Standing Order 52 operates to make the Chairman's decision final only in regard to the conduct and control of debates. Just what constitutes a " point of order " is not easy of definition but we have no hesitation in holding that it is not a point of order within the meaning of Standing Order 52 to determine at the outset whether or not a meeting at which the members have assembled has been validly called or not.

A somewhat similar regulation was considered by the Supreme Court of Victoria in *R. v. Foley* ([1928] V.L.R. 1) ; it was, however, somewhat wider in its terms than Standing Order 52 being one of a set of regulations under the heading " Regulation of Proceedings of Council, Officers etc." It provided that the Chairman, when called upon to decide on points of order or practice, should state the provision, rule or practice which he deemed applicable to the case without discussing or commenting on the same and that his decision as to order or explanation in each case should be final. In this case, the action of the Chairman in immediately closing the meeting with a ruling that it was not competent for it to transact any business at all goes very much further than Standing Order 52 authorizes. Possibly, had he allowed the meeting to proceed and when the first of the motions was moved had ruled that as a matter of order it could not be accepted, Standing Order 52 might have been



applicable. But the position was otherwise. The Chairman did not rule on any point of order within the contemplation of Standing Order 52 but merely ruled (for reasons which he gave) that the meeting was irregular, and he accordingly closed it. Strictly speaking, his attitude

- 5 was somewhat inconsistent for, if the meeting was not a properly constituted meeting, it is difficult to see what standing he had as Chairman of the Board. In fact, he recognized the meeting as a valid meeting by taking the Chair and by subsequently approving minutes thereof entered in the Minute-Book. It must be presumed, in the absence of evidence  
10 to the contrary, that he acted *bona fide*. He had apparently obtained a legal opinion and had been advised that the meeting was invalidly called, for the reasons upon which he based his decision. It is, of course, his duty to take care that the business of the Board is conducted in a proper manner, but he must be equally careful in his capacity of Chairman  
15 to conduct himself impartially and to see that the opinion of the meeting is properly ascertained upon any question which is regularly before the meeting. If he had misgivings as to whether the meeting was in order, he might well have obtained the opinion of the Board's solicitor or even instructed the Board's solicitor to take counsel's opinion.

- 20 The position is, therefore, that there was a meeting which we have held to have been a valid meeting; that the Chairman recognized the meeting as a valid meeting by taking the Chair; then, in exercise of his authority as Chairman, he declared the meeting closed, on the basis that it had not been validly called. Since he gave no opportunity for any  
25 business to be brought forward, the stage was never reached at which he would have been invested, by virtue of Standing Order 52, with authority to control the business. Instead of waiting until a motion was moved, he precipitately closed the meeting when he should properly have allowed the meeting to proceed to business. We hold accordingly  
30 that his action in peremptorily declaring the meeting at an end and leaving the room was not justified, and that it was competent for the meeting to go on with the business for which it had been convened and to appoint another Chairman for this purpose: *National Dwellings Society v. Sykes* ([1894] 3 Ch. 159). We are satisfied that all the resolutions  
35 adopted by the meeting were within its competence, and as such are binding on the Board.

- The remaining point raised is whether it was legally competent for the resignation of the Superintendent-in-Chief to be withdrawn. No  
40 doubt, once it was given, it was legally effective to terminate the appointment on the expiration of the six months' notice, but, in our opinion, it was competent for the Board during the pendency of the notice to invite the officer to withdraw it, and upon his doing so to resolve formally to accept the withdrawal. There is nothing in principle or authority to prevent such a course of action; and, in our view, the resignation ceased  
45 to have any effect upon the passing of the resolutions at the special meeting of April 23, 1953.

In the result there will be judgment for the plaintiffs for the relief sought, the precise terms of the orders to be settled after hearing counsel. The question of costs will be reserved.

*Judgment for the plaintiffs for the relief sought.*

Solicitors for the plaintiffs: *Bell, Gully, and Co.* (Wellington).

Solicitors for the first defendant: *Chapman, Tripp, and Co.* (Wellington).

Solicitors for the second defendant: *Brandon, Ward, and Watts* (Wellington).



## MOUNT ALBERT BOROUGH AND OTHER BOROUGH v. AUCKLAND TRANSPORT BOARD.

SUPREME COURT. Auckland. 1953. July 9; September 24;  
November 16. HAY, J.

*Tramways—Maintenance and Repair of Roads by Promoter of Tramway System—Extent of Liability to Local Authorities for Maintenance of Middle Strip of Road between Two Sets of Tramways—Liability of Tramway Promoter, upon Permanent Taking-up of Tramway, for Restoration of Portion of Roadway on which Such Tramway was laid—Standard of Restoration—Construction of Provisions in Second Schedule to Tramways Act, 1908—Tramways Act, 1908, s. 9, Second Schedule, Regs. 4, 5, 16 (2).*

The proper construction to be placed on the provisions of the Second Schedule to the Tramways Act, 1908, is that they were intended to lay down a general standard, subject to such variations and conditions as might be rendered necessary according to the facts and circumstances of each particular case; and that they operate with full force except where so varied.

The powers contained in Regs. 4 and 5 of the Second Schedule to the Tramways Act, 1908, render it competent for the Order in Council in any particular case to create a higher and different obligation for repair than and from that imposed by Reg. 16 (1).

The plaintiffs (the boroughs of Mount Albert, Mount Eden, Mount Roskill, Newmarket, Onehunga, and One Tree Hill) were municipal corporations constituted under the Municipal Corporations Act, 1933, and their respective boundaries (all lying within the Auckland Transport Board District) included parts of the urban area known as Auckland. The defendant corporation was constituted under the Auckland Transport Board Act, 1928, and operated a tramway system and other transport systems within its district. Tramways of the defendant were laid in roads and streets vested in fee simple in the respective plaintiffs. In certain of those roads and streets two lines of tramways were laid, the average width between the two inner rails being 5 ft. 8½ in. on straight stretches, increasing, however, on sharp curves.

All the tramways were laid under and by virtue of Orders in Council issued under the provisions of the Tramways Act, 1908. Before the incorporation of the defendant, such Orders in Council were issued in favour of the local authorities of the districts in which the tramways were to be laid; and such local authorities, in all cases, delegated their powers (pursuant to the powers of delegation contained in s. 9 of the Tramways Act, 1908), the delegates constructing and operating the tramways under and by virtue of diverse deeds of delegation from the local authorities. The first delegate was the Auckland Electric Tramways Co., Ltd., which later went into liquidation and assigned the benefit and burden of the various deeds of delegation to the Auckland City Council. That Council from July 1, 1919, operated the tramways as the delegate of the local authorities, and entered into further deeds of delegation directly with the local authorities, until, on January 16, 1929 (by virtue of the Auckland Transport Board Act, 1928), the tramway undertaking of the Auckland City Council was made over to the defendant. After the incorporation of the defendant, certain further tramways were laid by it, pursuant to Orders in Council directly in its favour, in roads and streets vested in fee simple in the respective plaintiffs. In certain roads and streets in its district, the defendant had discontinued using its tramways and substituted a different form of transport, and had declared its intention to do the same in respect of certain of the roads and streets vested in fee simple in the respective plaintiffs.

This action was brought for the purpose of determining two matters in dispute between the parties:

(i) A question had arisen as to the liability for the maintenance and repair of the middle strip of road (approximately 2 ft. 8 in. wide) between the two sets of tramways, and being the strip the sides of which are in each case 1 ft. 6 in. from the nearest inner rail of the tram tracks.

The plaintiffs sought a declaration that the defendant was under a liability for the maintenance and repair of such middle strip; and that the defendant shall at all times maintain and keep in good condition and repair such middle strip, with such materials and in such manner as the local authority directs, and to its satisfaction.

(ii) A question had arisen under Reg. 16 (2) of the Second Schedule to the Tramways Act, 1908, as to the standard to which the defendant, upon the permanent taking up of any tramway, is obliged to fill in the ground, make good the surface, and restore the portion of the road upon which such tramway was laid.

The plaintiffs sought a declaration that, if the defendant abandons its undertaking or any part of the same, and takes up any tramway or any part thereof, it shall, with all convenient speed, and in all cases within six weeks at the most (unless the local authority otherwise consents in writing), fill in the ground and make good the surface, and, to the satisfaction of the local authority, restore the portion of the road upon which such tramway was laid to the same standard as that of the other portions of the road at the time of such taking up.

*Held*, 1. That all the Orders in Council, subsequent to the Order in Council issued on March 28, 1907 (which expressed the repair obligation in cl. 37 in somewhat different language from the First Order in Council issued on April 27, 1901) including those issued directly to the defendant since its incorporation, used the same language as that contained in cl. 37 of the Order in Council of March 28, 1907; and, while the wording of the repair obligation in the Order in Council of April 27, 1901, differed from that of the corresponding clause in each of the subsequent Orders in Council, it expressed the same essential meaning—namely, that, where there is a double line, the obligation of repair is in respect of so much of the roadway as lies within the two outer rails, as well as 18 in. beyond each outer rail.

2. That the word "tramway" is used in the Orders in Council as referring either to a double or a single line; and the expression "the track between the rails of the tramway" in the repair clause in the subsequent Orders in Council refers (where there is a double line) to the whole of the area over which the rails extend.

3. That the clauses in the several deeds of delegation, in the case of all the deeds up to the year 1915, uniformly and specifically made it clear that, where there is a double line, the repair obligation is to be in respect of the roadway along which the tramway may run for a width of 18 ft. 9 in.; which is exactly the width, at least on straight stretches, between the outer rails of the double track, plus 18 in. on each side; and the wording of the repair clauses in the deeds between 1915 and 1918, although there was no specific reference therein to the width of 18 ft. 9 in., had the same effect as that of the clauses in the earlier deeds.

4. That there was a conflict between the liability to repair contained in each of the Orders in Council and that contained in Reg. 16 (1) of the Second Schedule to the Tramways Act, 1908; but the higher and different obligation for repair created by the Orders in Council than and from that created by Reg. 16 (1) was authorized by the powers contained in Regs. 4 and 5 of that Schedule.

5. That the express preservation of the burden of contracts and obligations in s. 57 (1) of the Auckland Transport Board Act, 1928 (which makes over the tramway undertaking to the defendant Board, subject to the burden of all contracts and obligations of the Auckland City Council in connection therewith), is not cancelled by the general declaration continued in s. 57 (6), the effect of which is to declare that the Orders in Council are to vest in the defendant Board as if originally granted to it.

6. That, while there were various points in the tramway system where the distance between the rails was considerably greater than 5 ft. 8 in. (which, in this tramway system, is the average width between the two rails, increasing on sharp curves), the liability of the defendant Board in relation to such cases (which are by no means characteristic of the tramway system as a whole) is limited to the separate sets of tracks forming the perimeter of such inner areas, including 18 in. of roadway beyond each outer rail.

7. That the plaintiffs were entitled to judgment in their favour in terms of the first declaration which they sought.

8. That the obligation of the defendant Board, upon the permanent taking up of any tramway, in restoration of the portion of the road upon which the tramway was laid, in view of the clear terms of Reg. 16 (2) of the Second Schedule to the Tramways Act, 1908, was to fill in the ground and make good the surface, and, to the satisfaction of the local authority, restore the portion of the roadway upon which the tramway was laid to as good a condition as that in which it was before such tramway was laid thereon; that the standard of restoration was, therefore, the macadam standard; and that, accordingly, the plaintiffs were not entitled to the second declaration sought.

ACTION in which the six plaintiff boroughs sought certain declarations as hereinafter described.

The plaintiffs (the boroughs of Mount Albert, Mount Eden, Mount Roskill, Newmarket, Onehunga and One Tree Hill) were municipal corporations constituted under the Municipal Corporations Act, 1933, and their respective boundaries (all lying within the Auckland Transport Board District) included parts of the urban area known as Auckland. The defendant was a corporation constituted under the Auckland Transport Board Act, 1928, and operated a tramway system and other transport systems within its district. Tramways of the defendant were laid in roads and streets vested in fee simple in the respective plaintiffs. In certain of the roads and streets, two lines of tramways were laid, the average width between the two inner rails being 5 ft. 8½ in. on straight stretches, increasing, however, on sharp curves.

All these tramways were laid under and by virtue of Orders in Council issued under the provisions of the Tramways Act, 1908. Before the incorporation of the defendant, such Orders in Council were issued in favour of the local authorities of the districts in which the tramways were to be laid; and such local authorities, in all cases, delegated their powers (pursuant to the powers of delegation contained in s. 9 of the Tramways Act, 1908), the delegates constructing and operating the tramways under and by virtue of divers deeds of delegation from the local authorities. The first delegate was the Auckland Electric Tramways Co., Ltd., which later went into liquidation and assigned the benefit and burden of the various deeds of delegation to the Auckland City Council. That Council from July 1, 1919, operated the tramways as the delegate of the local authorities, and entered into further deeds of delegation directly with the local authorities, until on January 16, 1929 (by virtue of the Auckland Transport Board Act, 1928) the tramway undertaking of the Auckland City Council was made over to the defendant. After the incorporation of the defendant, certain further tramways were laid by it, pursuant to Orders in Council directly in its favour, in roads and streets vested in fee simple in the respective plaintiffs. In certain roads and streets in its district, the defendant had discontinued using its tramways and substituted a different form of transport, and had declared its intention to do the same in respect of certain of the roads and streets vested in fee simple in the respective plaintiffs.

This action was brought for the purpose of determining two matters in dispute between the parties. In the first place, a question had arisen as to the liability for the maintenance and repair of the middle strip of road (approximately 2 ft. 8 in. wide) between the two sets of tramways, and being the strip the sides of which were in each case 1 ft. 6 in. from the nearest inner rail of the tram tracks. The defendant said that it was under no liability for the maintenance and repair of such middle strip, and the plaintiffs sought a declaration to the contrary, and that the defendant should at all times maintain and keep in good condition and repair such middle strip, with such materials and in such manner as

the local authority directed, and to its satisfaction. In the second place, a question had arisen under Reg. 16 (2) of the Second Schedule to the Tramways Act, 1908, as to the standard to which the defendant, upon the permanent taking up of any tramway, was obliged to fill in the ground, make good the surface, and restore the portion of the road upon which such tramway was laid. On this question, a declaration was sought that, if the defendant abandoned its undertaking or any part of it, and took up any tramway or any part thereof, it should, with all convenient speed, and in all cases within six weeks at the most (unless the local authority otherwise consented in writing,) fill in the ground and make good the surface, and, to the satisfaction of the local authority, restore the portion of the road upon which such tramway was laid to the same standard as that of the other portions of the road at the time of such taking up.

15 *A. L. Martin*, for the plaintiffs.

*B. C. Haggitt*, for the defendant.

*Cur. adv. vult.*

HAY, J. [After setting out the foregoing facts]: As to the first question, the primary consideration is whether the repair obligation imposed by Reg. 16 (1) of the Second Schedule to the Tramways Act, 1908, is something fixed and unalterable, or whether, on the other hand, a higher obligation can be imposed by the Order in Council which constitutes the authorizing order for the purposes of the Second Schedule. Regulation 16 (1) is in the following terms:

25 16. (1) The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the local authority directs, and to its satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway; and where two tramways are laid by the same promoters in any road at a distance not more than four feet from each other, the portion of the road between the tramways; and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway.

In the Auckland tramway system, the width between the two sets of rails, that is, between the two inner rails, is more than 4 ft. (it averages 5 ft. 9 in.), and the contention on behalf of the defendant is that, within the express language of Reg. 16 (1), its liability for repair is limited to so much of the road as lies within each set of rails, and within 18 in. on each side thereof. On the other hand, the submission on behalf of the plaintiffs is that, pursuant to the powers in Regs. 4 and 5 of the Second Schedule, it is permissible for the authorizing order to create in a particular case, and in substitution for the obligation for repair contained in Reg. 16 (1), a higher and different obligation; and that such substituted obligation was, in fact, provided by the various Orders in Council issued throughout the history of the Auckland tramways.

45 The first Order in Council was issued on April 27, 1901, and expressed in cl. 19 thereof the following obligation for repair:

19. The Local Authority shall at all times repair and maintain in good condition, to the satisfaction of the Engineer, the roadway between the rails of the said Tramway as well where double as where single lines are laid, and in every case so much of the road as extends eighteen (18) inches beyond the rail of and on each side of the Tramway. If the Local Authority at any time during the continuance of this Order or any extension thereof pave the space between the rails with wood or other blocks, asphalt, or other preparation, the same shall be maintained by the Local Authority to the satisfaction of the Engineer.

The next Order in Council was issued on March 28, 1907, and expressed the repair obligation (cl. 37) in somewhat different language—namely :

37. Where the Tramway is constructed in a road the Local Authority shall at all times keep the track between the rails of the Tramway, and for a distance of eighteen inches on each outer side thereof, in good and substantial repair.

All the subsequent Orders in Council, including those issued directly to the defendant since its incorporation, used the same language for the repair clause as that contained in cl. 37 of the Order in Council of March 28, 1907.

It will be seen that the wording of the repair obligation in the Order in Council of April 27, 1901, differs from that of the corresponding clause in each of the subsequent Orders in Council, but, in my opinion, it expresses the same essential meaning—namely, that where there is a double line, the obligation of repair is in respect of so much of the roadway as lies within the two outer rails, as well as 18 in. beyond each outer rail. The wording of the clause in the subsequent Orders in Council is condensed in form, but, to my mind, is identical in meaning. That seems necessarily to follow from the use of the phrase "on each outer side thereof", and particularly the word "outer", an expression which would be quite inappropriate if the clause were to be construed (in the case of a double line) as referring to each line separately. There is abundant internal evidence in the Orders in Council that the word "tramway" is used as referring either to a double or single line, and I am unable to accept the submission of counsel for the defendant that, where there is a double line, that for the purposes of the repair clause must be deemed to be two tramways. It seems to me that the expression "the track between the rails of the tramway" in the repair clause in the subsequent Orders in Council is fairly capable of the construction (where there is a double line) that it refers to the whole of the area over which the rails extend.

If the view I have just expressed is sound, there is an undoubted conflict between the liability to repair contained in each of the Orders in Council and that contained in Reg. 16 (1), and I can come to no other conclusion than that such a result was deliberately intended. That, indeed, seems to follow from the departure in the language of the repair clauses from that of Reg. 16 (1). I accept the submission of counsel for the plaintiffs that the powers contained in Regs. 4 and 5 of the Second Schedule render it competent for the Order in Council in any particular case to create a higher and different obligation for repair than and from that under Reg. 16 (1). Regulations 4 and 5 are in the following terms :

4. Where it appears to the Governor-General in Council expedient and proper that the application should be granted, with or without addition or modification, or subject or not to any restriction or condition, the Governor-General by Order in Council may settle and make an authorizing order accordingly.

5. Every such order shall empower the local authority therein specified to make the tramway upon the gauge and in manner therein described, within the district of the local authority, upon any road or elsewhere, and shall contain such provisions as the Governor-General in Council, according to the nature of the application, the facts and circumstances of each case, and the provisions of this Act, thinks fit.

The necessity of providing these wide powers in the Governor-General in Council becomes evident from a perusal of the authorizing orders themselves, which are lengthy and carefully prepared documents setting out in elaborate detail the extent of the authority conferred in the particular case, and the rights and liabilities arising therefrom. From the nature of the case, it seems evident that the proper construction to be placed on the provisions of the Second Schedule is that they were intended to lay

down a general standard, subject to such variations and additions as might be considered necessary according to the facts and circumstances of each particular case; and that they operate with full force except where so varied.

- 5 The view I have taken as to the meaning of the repair obligation in the Orders in Council is strengthened when the language of the corresponding clauses in the various deeds of delegation is looked at. Those clauses, in the case of all the deeds up to the year 1915, uniformly and specifically make it clear that, where there is a double line, the repair obligation is to be in respect of the roadway along which the tramway may run for a width of at least 18 ft. 9 in. which is exactly the width, at least on straight stretches, between the outer rails of the double track, plus 18 in on each side. That width of 18 ft. 9 in. is made up of two running lines each of 4 ft. 8½ in. gauge; 5 ft. 8 in. of roadway between the two inner rails; width of the four rails themselves 8 in. and 18 in. of roadway beyond each outer rail. In the two deeds between 1915 and 1928, there is no specific reference to the width of 18 ft. 9 in. but, in my opinion, the wording of the repair clause has the same effect as that of the clauses in the earlier deeds. Having regard to the construction I have placed on the
- 10 repair clauses in the Orders in Council, it is unnecessary to consider the question argued whether the deeds of delegation could impose a higher repair obligation than that contained in the corresponding Orders in Council; though, in my opinion, Mr. *Martin* is right in his contention that the imposition of such a higher obligation would not, for the purposes
- 15 of s. 9 of the Tramways Act, 1908, be inconsistent with the provisions in the Orders in Council. Proceeding, therefore, on the view that the repair clauses in the deeds of delegation are valid, there is still to be considered the point raised by Mr. *Haggitt* that such deeds are wholly immaterial for present purposes by reason of the fact (according to his contention) that they never, at any stage, affected the defendant Board, and came to a complete end with the passing of the Act under which the Board was constituted. For that proposition, he relies on the provisions of s. 57 (6) of the Auckland Transport Board Act, 1928, the effect of which is to declare that the Orders in Council are to vest in the Board
- 20 as if originally granted to the Board; but there is also to be considered subs. (1) of the same section, which makes over the tramway undertaking to the Board, subject to the burden of all contracts and obligations of the Auckland City Council in connection therewith. The City Council, while it was the tramway authority, was bound by the deeds of delegation,
- 25 as it expressly covenanted with the various local authorities, in the assignments executed in the year 1920 from the Auckland Electric Tramways Co., Ltd., to observe the provisions of the deeds then in existence; and as it was itself the delegate under the various deeds subsequently executed. I agree with the submission of Mr. *Martin* that
- 30 the express preservation in s. 57 (1) of the burden of contracts and obligations is not cancelled by the general declaration contained in s. 57 (6), and that much more coercive language would be required to take away from the various local authorities the benefit of the stipulations as to road maintenance contained in the deeds under which they delegated
- 35 their powers. It is true that most of the deeds of delegation have ceased to operate, owing to the expiry of the period of thirty-three years for which they were granted, but, in the view I take, it is permissible to look at their provisions so far as they will assist in determining the true meaning and effect of the Orders in Council. It is not without significance that the deeds of delegation contain an express provision to the
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effect that the provisions of the Act, its Schedules and Regulations, are (as modified by the deeds themselves) to be deemed to be incorporated therein as though set out at length.

In support of the interpretation contended for by the plaintiffs, reliance is placed upon the usage that has existed between the parties. It is admitted by the defendant that it has been its practice in the past to attend to the maintenance and repair of the whole width of roadway between double sets of rails, but that admission is made without any acknowledgment on its part that it was under any legal liability to do such work. It appears that a change in policy on this subject was made by the Board approximately a year ago, thus giving rise to the present controversy. In the view I have taken as to the interpretation of the Orders in Council, it is unnecessary for me to come to any determination as to the legal effect (if any) of this matter of usage, and I am assuming in favour of the defendant, but without deciding the point, that nothing in the nature of an estoppel can arise from the practice adopted in the past.

There is, however, one other matter to which a good deal of attention was given in the evidence, and which was relied on strongly by Mr. *Haggitt* in support of his argument. Whereas in the Auckland tramway system the average width between the two inner rails is 5 ft. 8 in. increasing on sharp curves, there are various points where the distance between the tracks is considerably greater than 5 ft. 8 in. such as the junction of Upper Queen Street and Karangahape Road (where there exists what is called a Y loop); at the Point Chevalier terminus where there is a balloon loop for turning the trams round; and at Broadway, Newmarket, where there are three sets of tracks converging from different directions. In all such cases, there is enclosed within the tram tracks generally an inner area of roadway more or less extensive; and the contention advanced by Mr. *Haggitt* is to the effect that a departure from the standard prescribed by Reg. 16 (1) of the Second Schedule would necessarily involve the defendant in liability for the maintenance and repair of all such inner areas. That argument, however, appears to me to be entirely fallacious, as in no sense can such inner areas be regarded as part of the tramway. As to the language of the repair clauses of the Orders in Council in relation to such cases (which are by no means characteristic of the tramway system as a whole), the plain effect seems to be that the liability of the defendant is limited to the separate sets of tracks forming the perimeter of such inner areas, including, of course, 18 in. of roadway beyond each outer rail.

For the reasons given, the plaintiffs are, in my opinion, entitled to succeed on the first question, and to have judgment in their favour in terms of the declaration sought.

The answer to the second question depends entirely upon the true construction of Reg. 16 (2) of the Second Schedule to the Tramways Act, 1908, the provisions and the subject-matter of which are in no way referred to in the Orders in Council, nor in the deeds of delegation except for the reference (which I have already mentioned) to the incorporation therein of the provisions of the Act, its Schedules and Regulations. The position arising upon the permanent taking up of the tramway, or any part thereof, is, therefore, governed solely by Reg. 16 (2), which provides as follows:

(2) If the promoters abandon their undertaking, or any part of the same, and take up any tramway or any part of any tramway belonging to them, they shall, with all convenient speed, and in all cases within six weeks at the most (unless



the local authority otherwise consents in writing), fill in the ground and make good the surface, and, to the satisfaction of the local authority, restore the portion of the road upon which such tramway was laid to as good a condition as that in which it was before such tramway was laid thereon, and clear away all surplus paving or installing material or rubbish occasioned by such work, and they shall in the meantime cause the place where the road is opened or broken up to be fenced and watched, and to be properly lighted at night.

- When the tramways were laid in Auckland in the early years of the present century, the roads both in the city and suburban areas were of the water-bound macadam type of construction, which to-day has been abandoned (so far at least as the tram routes are concerned) in favour of a higher standard of road, either concrete or bitumen, to meet modern traffic requirements. It is submitted on behalf of the plaintiffs that, when Reg. 16 (2) refers to restoring the portion of the road upon which the tramway was laid to as good a condition as that in which it was before the tramway was laid, this means in as good a condition having regard to the nature and condition of the other portions of the road at the time of restoration, and also having regard to the nature of the user of the road by the public. In other words, the contention is that the expression "to as good a condition as that in which it was before such "tramway was laid" means a restoration of the road to one uniform type, according to the nature of the rest of the road at the time of restoration. Any other reading of the Regulation would, it is submitted, leave a patchwork result, leaving the roading authorities with a major constructional job on their hands once the rails were taken up by the tramway authority.

- The language of Reg. 16 (2) is, however, so clear and unequivocal as to make it impossible for me to accept those submissions. I agree with Mr. Haggitt when he says that they ignore the elementary rule of construction stated in *Maxwell on Interpretation of Statutes* 9th Ed. 3 as follows :

When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise.

- The submissions of Mr. Martin, based as they are on what the consequences may be rather than on the meaning of the language itself, involve reading into the Regulation words which are not there, and, as stated by *Maxwell on Interpretations of Statutes* 9th Ed. 14 :

We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

- I am satisfied that the obligation of the defendant in the circumstances mentioned is, in the plain words of the Regulation, to fill in the ground and make good the surface, and, to the satisfaction of the local authority, restore the portion of the road upon which the tramway was laid to as good a condition as that in which it was before such tramway was laid thereon. The standard of restoration is, therefore, the macadam standard. The declaration sought by the plaintiffs on this subject must, therefore, be refused.

- In addition to the two questions with which I have already dealt, declarations are sought on two other matters set out in the prayer of the statement of claim as follows :

- (b) A declaration that the taking up by the defendant of any tramway shall amount to an abandonment of part of its undertaking and taking up of part of a tramway within the meaning of Regulation 16 (2) of the Second Schedule to the Tramways Act, 1908.

- (d) A declaration that the expression "promoters" in the said Regulation 16 means in this case the defendant, and that the expression "local authority" in the



said Regulation 16 means in this case each plaintiff in regard to its roads and streets in which tramways are laid.

It was intimated at the hearing by counsel for the defendant that there had never been any dispute between the parties on those matters. If desired, therefore, the judgment may be framed to include declarations by consent thereon. 5

As each of the parties has partly succeeded, there will be no order as to costs.

*Judgment accordingly.*

Solicitors for the plaintiffs: *Nicholson, Gribbin, Rogerson, and Nicholson* (Auckland).

Solicitors for the defendant: *Earl, Kent, Massey, Palmer, and Haggitt* (Auckland).

### PETONE BOROUGH v. DAUBNEY.

SUPREME COURT. Wellington. 1952. November 17. 1953, February 9. FAIR, J.

COURT OF APPEAL. Wellington. 1953. June 24, 25; December 22. HUTCHISON, J.; COOKE, J.; F. B. ADAMS, J.

*Municipal Corporation—Drainage—Private Drains—No Duty imposed on Council to repair Private Drains or to give Notice to Owners to repair Their Private Drains—Corporation not liable in Nuisance for Dangerous State of Sewers in Highway unless it has constructed Them, owns Them, or has Control and Management of Them—Municipal Corporations Act, 1933, ss. 229 (1) (b).*

The provisions of s. 229 (1) (b) of the Municipal Corporations Act, 1933, do not impose upon a Borough Council a duty—apart from a discretionary power—to give notice to owners requiring them to repair their private drains.

*East Suffolk Rivers Catchment Board v. Kent* ([1939] 2 All E.R. 207, and, on app., [1941] A.C. 74; [1940] 4 All E.R. 527) applied.

*Chapman v. Fylde Waterworks Co.* ([1894] 2 Q.B. 599) distinguished.

*Julius v. Lord Bishop of Oxford* (1880) 5 App. Cas. 214) referred to.

So held by the Court of Appeal, allowing an appeal from the judgment of Fair, J., (*post.*, p. 308).

At about 10.30 p.m., the plaintiff was walking along the footpath in Jackson Street in the Borough of Petone when his right foot caught in a hole in the footpath. He was thrown violently to the ground, and suffered permanent injury to his ankle. He claimed damages, alleging that the accident was due to the defendant corporation's misfeasance in negligently erecting or permitting to be erected in the pedestrian highway of Jackson Street an artificial structure, a storm-water drain, without exercising proper care and workmanship; permitting the drain to fall into disrepair and to become dangerous to pedestrians using the footpath; and failing to maintain the drain properly to prevent it from becoming a nuisance to users of the footpath. The defence was a general denial of the plaintiff's allegations.

The drain in question was an ordinary storm-water drain constructed from a building and running across and under the footpath to the street-channel. At some unknown date, about six months before the accident to the plaintiff, the concrete kerbing of the street-channel and the adjacent end of the drain were broken by some unknown means (probably by the wheel of a heavy vehicle negligently driven). The plaintiff and others observed the resulting hole at the edge of the footpath, and watched it growing slowly as

month succeeded month; but no one thought of informing the defendant corporation or any of its officers or servants until after the accident. The footpath was then promptly repaired, involving some repair to the broken drain-pipe.

Apart from these facts, nothing was known as to the history of the drain, except that it was constructed before 1905. There was no ground for supposing that it was constructed by, or at the instance of, the defendant corporation. The work of forming and asphaltting the surface of the footpath over the drain and the construction of the kerb and the outlet through the kerb must necessarily have been done by the defendant corporation, which had attended to the subsequent maintenance of the footpath and the kerb. Nothing was proved to have been done by it in its capacity as a drainage authority. Many years ago, it may have given an express or implied consent to the construction of the drain.

The jury found that the footpath was a source of danger to pedestrians, and that the defendant corporation was negligent in not discovering and remedying the defect in the footpath "in some degree," and it assessed the damages as special, £179 8s. and general, £360. It was agreed that any further questions of fact should be determined by the learned Judge. The plaintiff moved for judgment; and the defendant corporation moved for nonsuit on the following grounds: (a) That the case disclosed no evidence of misfeasance on the part of the defendant; (b) that the verdict of the jury did not involve a finding of misfeasance on the part of the defendant; and (c) that the facts proved by the evidence constituted no more than non-feasance on the part of the defendant.

After hearing argument, the learned trial Judge dismissed the motion for nonsuit, and gave judgment for the plaintiff against the defendant corporation in its capacity as a drainage authority for two-thirds of the special and general damages assessed by the jury, after finding contributory negligence on the plaintiff's part.

On an appeal by the defendant corporation from that determination and a cross-appeal by the plaintiff on the question of contributory negligence,

*Held, per totam curiam*, 1. That the drain having been installed for purposes other than the use of a highway as a highway, there was no evidence of any misfeasance on the appellants corporation's part as a highway authority; and it was not liable for its nonfeasance.

2. That there was no duty imposed on the appellants corporation, as a drainage authority, at common law or by the drainage provisions of the Municipal Corporations Act, 1933, to repair the drain, which was a private drain which had not become vested in the appellant.

3. That, accordingly, the appeal should be allowed, and the cross-appeal consequentially dismissed.

*Per Cooke, J.* 1. That, apart from some special statutory provision, a sewage or drainage authority is not liable in nuisance for the dangerous state of sewers in a highway unless (a) it has constructed them; or (b) it is the owner of them; or (c) it has the control and management of them.

*White v. Hindley Local Board of Health* (1875) L.R. 10 Q.B. 219; *Buckle v. Bayswater Road Board* ([1936] 57 C.L.R. 239) applied.

*Borough of Bathurst v. Macpherson* (1879) 4 App. Cas. 256; *Municipality of Pictou v. Geldert* ([1893] A.C. 524); *Municipal Council of Sydney v. Bourke* ([1895] A.C. 433, 441); *Steel v. Dartford Local Board* ([1891] 60 L.J.Q.B. 256); *Skilton v. Epsom and Ewell Urban District Council* ([1937] 1 K.B. 112; [1938] 2 All E.R. 50); *Stimon v. Islington Borough Council* ([1943] K.B. 188; [1943] 1 All E.R. 41); *Thompson v. Mayor etc. of Brighton* ([1894] 1 Q.B. 332) and *Hall v. Beckenham Corporation* ([1949] 1 K.B. 716; [1949] 1 All E.R. 423) referred to.

2. That it could not be inferred that the appellants corporation had itself constructed the drain; and, even if its construction by the then owner of premises (as must be inferred) took place in compliance with a notice from the Borough Council given under s. 274 (1) (a) of Municipal Corporations Act, 1900, such construction could not have constituted construction by the appellants corporation.

*Steel v. Dartford Local Board* ((1891) 60 L.J. Q.B. 256) referred to.

3. That the provisions contained in s. 229 (1) (a) of the Municipal Corporations Act, 1933, and in s. 274 (1) (a) of the Municipal Corporations Act, 1900, and in the corresponding sections in the intervening Acts of 1908 and 1920, showed that the drain was a private drain within the meaning of the legislation.

4. That there was no evidence of anything having been done by the Borough Council under s. 274 of the Municipal Corporations Act, 1900, or under the successors of that section, or under any other power, that could have constituted "actual control" within the meaning of s. 220 of the Municipal Corporations Act, 1933; and, therefore, the drain had not become a public drain, and was thus not vested in the Council by virtue of s. 219 of the Municipal Corporations Act, 1933.

5. That the provisions of s. 229 (1) (b) and s. 229 (6) of the Municipal Corporations Act, 1933—which do not impose a duty, as distinct from a discretionary power—fall short of showing that the drain was under the control or management of the appellant corporation.

Per *F. B. Adams, J.* 1. That the drain was not a "public drain" within the ordinary meaning of the words; and, in the absence of any evidence of control, actually and consciously exercised by the Borough Council for twenty years, s. 220 of the Municipal Corporations Act, 1933, did not make it such; and that no act of control was proved other than the repair of the drain after the accident to the respondent, and this was done rather for the purpose of repairing the footpath than with a view to repairing the drain.

2. That there was, therefore, no breach of any legal duty on the appellant corporation's part; the jury's findings were irrelevant in the circumstances; and the respondent's cross-appeal on the question of contributory negligence was also irrelevant.

Appeal from the judgment of *Fair, J.*, (*post.*, p. 309), allowed.

**ACTION** claiming damages for personal injuries arising out of an accident to the plaintiff while walking along a footpath in the Borough of 30  
Petone, allegedly due to the misfeasance of the defendant corporation.

Some time before the year 1905, a drain consisting of four-inch diameter earthenware pipes was laid below the surface of the footpath opposite the building No. 303 Jackson Street, Petone, in order to take away the storm water from the privately-owned building there, and discharge it in the street channel. It did not appear whether the work was carried out by the Borough Council at the time or by the owner himself. There was no suggestion that it was improperly constructed. It was laid some 2 in. below the present asphalt surface of the footpath.

Some six months before January 12, 1952, a motor-lorry proceeding across the footpath to a passage-way alongside the building known as No. 303, crushed the concrete kerbing of the footpath and the under-section of the earthenware piping near it, and caused a depression in the footpath close to the kerbing. This depression continued in existence until the accident referred to happened.

The evidence as to its nature varied. The plaintiff said it would extend from the kerb edge to 18 in. into the footpath and was about 18 in wide by about 5 in. or 6 in. deep exposing the broken section of drainpipe. The road foreman, who subsequently repaired it on January 17, 1952, said the concrete kerb was broken to an extent of 6 in. to 8 in. in breadth and the asphalt footpath above it broken about 3 in. to 4 in. in from the kerb leaving a hole of about 7 in.

The plaintiff passed the spot frequently and had often observed the hole, noticing that it had been increasing in size. He did not report its existence to the Borough offices.

While walking along the footpath about 10.30 p.m. on the night of January 12, 1952, his heel caught in the jagged hole in the footpath,

and he was thrown to the ground suffering injuries which necessitated his spending some twelve or thirteen weeks away from work, and attending for a considerable period for treatment at the hospital.

He claimed that the accident was due to misfeasance of the defendant,

5 its servants or agents :

(a) In the erection of the drain ;

(b) Permitting it to fall into disrepair and become dangerous.

(c) Failing properly to maintain it to prevent it from becoming a nuisance to the users of the footpath.

10 At the trial of the action before a jury, the following issues were submitted to the jury :

1. Was the footpath a source of danger to pedestrians ?—Yes.

2. Was the defendant negligent in not discovering and remedying the defect in the footpath ?—Yes, in some degree.

15 3. Assess damages.—Special : £179 8s. General : £360.

It was agreed that any further questions of fact should be determined by the learned trial Judge. The plaintiff thereafter moved for judgment; and the defendant moved for nonsuit on the following grounds :—

(a) That the case discloses no evidence of misfeasance on the part  
20 of the defendant.

(b) That the verdict of the jury does not involve a finding of misfeasance on the part of the defendant.

(c) That the facts proved by the evidence constitute no more than non-feasance on the part of the defendant.

25 *Relling*, for the plaintiff.

*Shorland*, for the defendant corporation.

*Cur. adv. vult.*

FAIR, J. Upon the argument on the motion for judgment and on the motion for nonsuit, a mass of authority was cited. But most of the  
30 cases to which my attention was directed deal with well-established principles and, as they are to be found set out correctly in *16 Halsbury's Laws of England*, 2nd Ed., p. 332 *et seq.*, I do not propose to refer to them in detail. They are useful as illustrating the obligation, and definition of the principle, of a highway authority not being liable for non-feasance,  
35 but otherwise they seem to refer to well-established principles.

So far as such principles are required to be considered in the present case, they may be stated as follows : No action for damages will lie against a highway authority (including local bodies entrusted with the care of the highways) at the suit of a person who has suffered injury  
40 through mere non-feasance of the authority in the discharge of its duties; and in order to establish liability it is necessary to show some act amounting to positive misfeasance as opposed to mere non-feasance.

In respect of other statutory powers and duties of local bodies, they are, in general, liable for negligence whether of omission or commission,  
45 and are liable for nuisance resulting from their works other than those administered as highway authorities : s. 173 of the Municipal Corporations Act, 1933 ; *Irvine and Co., Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741 ; [1939] G.L.R. 390). It is also well established that a local body is responsible for damage caused by negligence, whether  
50 non-feasance or misfeasance, in the execution of works carried out on the highway or existing on the highway for purposes other than the use of it as a highway. Among many such purposes are the execution of

its duties as a drainage authority, to provide a system of drainage for the Borough. One of the clearest examples of this type of case is *White v. Hindley Local Board* (1875) L.R. 10 Q.B. 219 where the clear-cut issue was decided: see also *Municipal Council of Sydney v. Bourke* ([1895] A.C. 433). The sole question here to be decided seems to be whether the defendant is liable as drainage authority for the defect in the footpath due to the destruction of the drain and its non-repair.

The powers and duties of the Borough Council in respect of this type of drain are contained in PART XIX of the Municipal Corporations Act, 1933, ss. 219 *et seq.* Mr. *Relling* contends that this drain was a public drain within the definition of s. 220 as being a drain which "had been under the control" of the "Borough Council for not less than twenty years".

I do not think, however, that it does come under this definition. The definition refers, I think, to drains that are in their nature used for the public drainage of the Borough, or drainage that it is the recognized duty of the Council of the Borough to provide. "Private" drains are drains the construction and maintenance of which under s. 229 and succeeding sections are imposed upon the owners of the properties which they serve. Under that section, the Council may require them to construct and lay a private drain from any land or building which is not drained to the satisfaction of the Council, and connect it with any pipe, drain or covered watercourse or street-channel, as the Council thinks fit. It further can require him to cleanse and repair, or to relay or alter the course, direction, and outfall of any existing private drain of his premises.

Under subs. 6, if the owner fails to do any work specified, the Council may, if it thinks fit, cause the same to be done, and may recover from him the cost together with interest. Under ss. 353 and 354, failure to construct such private drains and keep them in repair when required is subject to a penalty of twenty pounds. Under s. 360, all sums payable by any person to the Council in respect of any works in respect of private drains executed by it may be recovered in any Court of competent jurisdiction. No doubt if this drain had been constructed by the Council in pursuance of a statutory duty for other than highway purposes, and irrespective of the liability of the owner, it would have been liable for negligence in its maintenance: *Papworth v. Battersea Corporation* ([1914] 2 K.B. 89; [1915] 1 K.B. 392). But, as appears from the statement of facts set out above, it was constructed not for its own purposes, or in pursuance of any obligation imposed on it by statute but, if it was constructed by the Council, it was for and at the cost of the owner of the land. It was carrying out a duty that rests upon the owner, and not upon itself, and the payment by the owner for it and his liability for its repair puts this beyond question.

A very similar argument to that submitted by Mr. *Relling* was addressed to the Court of Appeal in *Steel v. Dartford Local Board* ((1891) 60 L.J. Q.B. 256). There, the owner of certain cottages received notice from the defendant under the Public Health Act, 1875 (38 & 39 Vict. c. 55) requiring him to connect the drains of his cottages with the main sewer. He dug a trench in the road and made the connection to the satisfaction of the defendants' surveyor and then filled up the trench. Owing to negligence in the filling, it subsided, and was the cause of an accident to the plaintiff. The defendants were the sewer authority and the highway authority of the district. In an action for damages for personal injuries, it was held that the defendants were not liable as a sewer authority, on the ground that the notice did not constitute

the owner their agent; nor as a highway authority, on the ground that no action would rest on the local board arising from the non-repair of the highway. The Court in that case consisted of *Lindley, Lopes, and Kay, L.JJ.*, and I have found nothing in any of the later authorities that casts any doubt on the authority of this decision. It is to be noted, however, that in that case there was no evidence that the Local Board knew, or ought to have known, of the defect, before the accident so there was no question of it allowing a nuisance to continue.

Mr. *Relling* relied on the decision in *Simon v. Islington Borough Council* ([1943] K.B. 188; [1943] 1 All E.R. 41) and particularly the passage set out on p. 198; 45). But, in that case, the respondent, in pursuance of powers given to it by statute, had taken over the tramway from the London Passenger Transport Board, and it was a danger on the highway which was solely owned by the respondents and for which they were solely responsible. The Court held that: "They were no part of the road proper, and the duty of the Council as highway authority was to treat them as obstructions to traffic, protect traffic from their dangers, and abate the nuisance as soon as they could. In the meantime, they took the risk of any injuries to members of the public using the road as a mere road. The capacity in which they were related to the obstructing metal and stones was that of highway authority owning a road in which a foreign substance had been inserted, and we cannot see any legal ground on which they were in any better position than if they had themselves put similar lengths of metal and blocks of granite in the surface of the road where, as road material, they had no place. The Council were in no better position than if the board had gone into liquidation and the Council had bought the old iron and granite from the liquidator, to remove it themselves and sell it at a profit" (*ibid.* 198; 45).

This passage makes clear how widely different that situation was from the present. It is true the Court went on to say: "*Skilton v. Epsom and Ewell U.D.C.* ([1937] 1 K.B. 112; [1936] 2 All E.R. 50) is a decision, binding on us, to the effect that the relation of a highway authority to works constructed in a highway for other than highway purposes, by whomsoever placed there, is not one clothed with the immunity of the ancient highway authority known to English law" (*ibid.*, 198; 45). But the later reference to *White v. Hindley Local Board of Health* (1875) L.R. 10 Q.B. 219, 223) shows that the phrase "by whomsoever placed there" in this context means even though they are placed in pursuance of other powers, and for other purposes, by the authority having control of the highway. It simply means—even though placed there by itself—i.e., that a highway authority is not entitled to shelter behind immunity in that respect when it acts negligently as to matters in relation to the road which are foreign to its duty as the authority controlling the road *qua* highway.

It seems to me that the only really arguable questions are ones that have not been directly raised in the statement of claim although they may be covered by the allegations that the accident was due to the misfeasance of the defendant, its servants or agents in

- (b) permitting the said drain to fall into disrepair and to become dangerous for pedestrians proceeding along the said footpath; and
- (c) failing properly to maintain the said drain and prevent it from becoming a nuisance to the users of the footpath.

The first question that requires consideration is whether it was negligent of the defendant to fail for so long to call upon the owner of the premises to effect the repair of the drain. It seems that there is here plain evidence of neglect of what should be a plain duty of the defendant. It is argued, however, that such an obligation is imposed on it *qua* drainage authority. The drain, it appears, was functioning quite reasonably as a drain for the surface water except in so far as it had destroyed a portion of the pavement. There is no evidence that it was not carrying the water away satisfactorily, and so there was no ground for the defendant to complain as to the drainage. This argument seems fallacious as it seems to me that the meaning of "repair" in the context in which it is found includes repair for all purposes. There was ground for complaint in that the drainage was negligently maintained, and so did not conform to the standard reasonably required in conducting the water to the water channel.

It seems to me, too, that there is a plain duty on the drainage authority in respect of drainage not constructed in order to serve the highway, to exercise its powers to prevent nuisances existing on the highway. If it knew, or, as in this case, ought to have known, of the defect, it may be liable for negligence. That depends upon whether the corporation has a duty to act under s. 229. This question was not fully argued before me; but, upon the principles set out in *31 Halsbury's Laws of England*, 2nd Ed., p. 529, para. 692, it would appear that there was a statutory obligation on the defendant to require the owner to repair this drain if it had got into a state that rendered it a danger to pedestrians. If it had done so, its powers, and the penalties under ss. 353, 354 and 360 would, it may reasonably be inferred, have induced the owner to attend to the repairs promptly. The terms of s. 226 show that under that section an obligation to do the work itself is not imposed on the defendant although it may do it "if it thinks fit." Any allegation of negligence based on the provision of the statute must, I think, depend on its failure to give the owner notice to repair. Whether or not a breach of this duty to enforce the repair of private drains gives a right of action to a private individual injured by it is a difficult question upon which no argument was addressed to me; and which I do not propose to decide, as it appears to me the plaintiff is entitled to recover on the ground that the defendant is responsible for the nuisance existing on the footpath in the hole caused as a result of the destruction of the drainpipe near the kerb.

The drainage rights conferred upon the Borough Council require to be considered apart from its rights and duties as a highway authority. As a drainage authority it had the right to authorize the occupation of the space taken up by this drain and had the right to support for such pipes: *Newcastle-under-Lyme Corporation v. Wolstanton, Ltd.* ([1947] Ch. 427, 457; [1947] 1 All E.R. 218, 224); *Normanton Gas Co. v. Pope and Pearson, Ltd.* ((1883) 52 L.J. Q.B. 629). It was only by virtue of the defendant's power to authorize the street to be used for this purpose that a private owner could lay, or cause to be laid, pipes under the footpath to carry water away from his building.

In my view, a general survey of the provisions of the Municipal Corporations Act, 1933, with regard to drainage show that the streets are vested in the defendant under s. 175 of the Municipal Corporations Act, 1933, for the purposes of drainage, as well as for use as highways and other purposes. It follows that as a drainage authority it is the owner of the soil so far at least as the ownership is necessary for drainage purposes. There is no doubt as to the liability of private owners to an

- action for nuisance where they create a danger of this kind alongside a highway: 24 *Halsbury's Laws of England*, 2nd Ed., p. 83, para. 147, p. 85, para 149. Public bodies are liable for nuisances in the same way as other persons are liable unless protected by statute, or in cases of non-feasance while acting in their capacity as surveyors of highways: (*ibid.*, p. 87, para. 152). An occupier of land is liable for continuing a nuisance that exists on his land. He "continues" it if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end: *Sedleigh-Denfield v. O'Callaghan* ([1940] A.C. 880, 894; [1940] 3 All E.R. 349, 358). The general principles upon which an owner of land is made liable for such nuisances where he knew or ought to have known of them have been recently considered in two English cases. In *Hall v. Beckenham Corporation* ([1949] 1 K.B. 716; [1949] 1 All E.R. 423), *Finnemore, J.*, said in respect of the defendant corporation which had management and control of a park, although it was left an open question whether they were the "occupiers" of it: "I think that the legal position is the same as if they were occupiers. Whether a person occupies land in the strict sense, or has the management and control of it, he must occupy or manage and control it so that it is not a nuisance. In some circumstances a statute may authorize a nuisance, but the fact that something is done by statutory authority does not entitle the person doing it to disregard others' rights, or to create a nuisance to others, unless the Act itself authorizes things to be done which cannot be done otherwise than by creating a nuisance. . . . Therefore, if the corporation here use, or permit to be used, this recreation ground so that it becomes a nuisance, they will be liable, subject to . . . the extent of their powers over this ground" (*ibid.*, 727; 426).
- The liability of a local body for acts done on a highway other than those of its care and maintenance is exemplified by the decision in *Skilton v. Epsom and Ewell Urban District Council* ([1937] 1 K.B. 112; [1936] 2 All E.R. 50), particularly *Romer, L.J.*, (*ibid.*, 125-127; 59, 60). That was a case where the defendants had control of a highway both as surveyors of the highway, and as transport authority in relation to the control of the traffic thereon. It had placed certain studs on the surface of the road to direct the flow of the traffic. Owing to its negligence, one of these flew out and injured a person who claimed damages. It was sought to avoid liability on the ground that the studs as originally placed were suitable, and it was a case of non-feasance. *Romer, L.J.*, says: "There is, I think, ample authority to be found in the books for the proposition that a person causing a nuisance on the highway of such a nature may be held liable although he happens also to be a surveyor of highways or other highway authority" (*ibid.*, 126; 59).

- He quotes from *Lord Herschell's* judgment in the Privy Council in *Municipal Council of Sydney v. Bourke* ([1895] A.C. 433) where he said in respect of a drain under a highway: "The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous." . . . The owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the municipality be less liable than any other person, in respect of the same acts, merely because the road is vested in them and certain powers or duties in relation to its repair are committed to them?"



(*ibid.*, 441). It is true that here the defendant did not construct this drain. But it was under licence from it that it was placed upon the highway under the footpath, and it had the power and duty to see that it was kept in repair. In such circumstances not only was it the owner of the soil on which it rested, but it remained under its control. In such circumstances, the principles applied to landlords as well as occupiers seem to be applicable. They have recently been reviewed in *Heap v. Ind Coope and Allsopp, Ltd.* ([1940] 2 K.B. 476; [1940] 3 All E.R. 634). In that case, it was held that a landlord was liable for injuries caused by the defective condition of premises alongside a highway even though he had not covenanted with the tenant to do the external repairs. *MacKinnon, L.J.*, (*ibid.*, 484; 637) quotes *Goddard, J.*, in *Wilchick v. Marks and Silverstone* ([1934] 2 K.B. 56) where he says: "The landlord has expressly reserved to himself the right to enter and do necessary repairs: why then should he be under no duty to make it safe for passers by when he knows that the property is dangerous? The proximity is there: he has the right to enter and remedy a known danger. Is the injured person to be left in such a case only to a remedy against the tenant?" (*ibid.*, 67).

To the same effect was a decision in *Mint v. Good* ([1951] 1 K.B. 517; [1950] 2 All E.R. 1159) where the landlord had an implied right to re-enter. There the same passage from *Wilchick v. Marks and Silverstone* ([1934] 2 K.B. 56) is quoted with the same modification (immaterial to the present case) that the landlord does not require to know if the property is dangerous. *Gorringe v. Transport Commission* ((1950) 80 C.L.R. 357) relied on by Mr. *Shorland* does not appear to assist here. The defective culvert there was constructed by the defendant for highway purposes. It is there said: "It has no other functions or powers, for example, in respect of drainage" (*ibid.*, 362). So *Lambert v. Lowestoft Corporation* ([1901] 1 K.B. 590) deals with the case of a defect in a sewer in the non-repair of which there was no negligence; but may be of doubtful authority in the light of later decisions: see also *Buckle v. Bayswater Road Board* ((1936) 57 C.L.R. 259, 271, 298, *et seq.*). *Fortescue's* case ([1920] N.Z.L.R. 281; [1920] G.L.R. 214) was like *Corringe's* ((1950) 80 C.L.R. 357) in respect of a road culvert and the discharge of waters therefrom.

On the question of contributory negligence, in my view, although it was a dark night, the plaintiff must be considered guilty of a serious degree of contributory negligence. He had seen, noted and remarked upon this dangerous condition for some months previously. Knowing that he was in the vicinity of it he should have been on his guard against the danger, and taken special care to avoid it. This, apparently, he did not do, and, although one can appreciate that such a want of care might occur through inadvertence, I feel that, in the circumstances, he is partly responsible for his misfortune. His negligence, however, was momentary and the neglect of the defendant's servants extended over a considerably longer time although it was not, I think, of so serious a nature as the plaintiff's description of the hole in the pavement might lead one to conclude. Apportionment is, in such circumstances, always difficult, but I think the position may be fairly met by attributing one-third of the responsibility to the plaintiff, and two-thirds to the defendant.

The motion for nonsuit is dismissed, and judgment given for two-thirds of the special, and two-thirds of the general, damages awarded.

The question of costs was not argued before me and, if the parties wish to make any submissions on this question, they may be submitted to me in writing.

From the foregoing judgment, the defendant corporation appealed, and the plaintiff cross-appealed from that part of the judgment holding the plaintiff to be guilty of contributory negligence and the consequential reduction of the damages awarded to him.

5 In the Court of Appeal,

*Shorland*, for the appellant corporation. There is no evidence which suggested that the drain beneath the footpath, which gave rise to the hole which caused the accident, had been constructed by the defendant. It was laid privately pursuant to s. 274 of the Municipal Corporations Act, 1900, which is now s. 229 of the Municipal Corporations Act, 1933, but subs. (2) thereof was not in the earlier section.

Before 1900, the Act in force was the Municipal Corporations Act, 1886, which contained no section in terms similar to the present s. 229; but see s. 277 of that statute, which meant that there was a duty by implication cast on a building owner to provide for storm-water drainage; and, if he did not have drainage to the satisfaction of the Council, then the Council could construct the drain and charge the owner. This particular drain, in the absence of any record, can be assumed to have been installed mainly under the Municipal Corporations Act, 1900. Alternatively, the onus is on the plaintiff to establish whatever facts are necessary to found his case, and some help, in the very understandable absence of information, might be got from *Batt v. Metropolitan Water Board* ([1911] 2 K.B. 965, 971, 974) in which the Court dealt with a similar situation on the presumption that the stop-cock was inserted pursuant to the then current legislation; so that, unless the plaintiff proves, and the onus is on him, that the storm-water pipe or drain which gave rise to the hole in the footpath was installed by the defendant, then the case must stand on the footing of a drain or pipe installed by some unknown person, the owner of No. 303, in accordance with the statutory requirements then obtaining; and the case must be dealt with on the basis that the drain was laid by some person other than the defendant.

The only charge that can be made against the appellant, on the evidence and findings of this case, is not that it did something and thereby created a nuisance or danger, but that it failed to remedy what was admittedly a nuisance in the footpath or highway which had been created by someone else.

The appellant meets the plaintiff's case as follows:

A. The appellant is not liable for non-feasance in failing to repair the footpath: *Cowley v. Newmarket District Council* ([1892] A.C. 345) which applied *Russell v. Men of Devon* ((1788) 2 Term Rep. 667; 100 E.R. 359) to the statutory authority of an urban body having control and responsibility of highway; and that decision was followed in *Tarry v. Taranaki County Council* ((1894) 12 N.Z.L.R. 467). The same principle was applied by the Privy Council in regard to local bodies in 45 Nova Scotia and New South Wales: *Municipality of Pictou v. Geldert* ([1893] A.C. 524) and *Municipal Council of Sydney v. Bourke* ([1895] A.C. 433); and by *Sir Michael Myers, C.J.*, in *Gascoyne v. Wellington City Corporation*, ((1942) 4 N.Z.L.G.R. 168).

B. Failure by a local body to repair a subsidence in the highway 50 which has resulted from the collapse of a drain introduced by someone else is mere non-feasance for which the local body is not liable: *Steel v. Dartford Local Board* ((1891) 60 L.J.Q.B. 256), where the position was

analogous to that in the present case, because the Municipal Corporation Acts vested the streets within the boundaries of the Borough in the local authority, and s. 149 of the Public Health Act, 1875 (38 & 39 Vict., c. 55) which vested the streets in local bodies, conferred the power rather than imposed the duty to repair, as in s. 175 of the Municipal Corporations Act, 1933. Section 23 of the Public Health Act, 1875, is, in substance, analogous to s. 229 of the Municipal Corporations Act, 1933; and the Dartford Local Board stood in the same relation to the drain in that case as the Petone Borough does in relation to the drain in the present case. *Steel's case* ((1891) 60 L.J.Q.B. 256) is distinguishable from the authorities establishing that where a local body, in pursuance of powers, has itself placed a drain under the highway, on its subsidence, it causes an accident, the local body has been held responsible and liable for damages: see *Borough of Bathurst v. MacPherson* ((1879) 4 App. Cas. 256). In two subsequent cases, the Privy Council itself gave the *ratio decidendi* of *MacPherson's case*: see *Municipality of Picton v. Geldert* ([1893] A.C. 524, 531), and *Municipal Council of Sydney v. Bourke* ([1895] A.C. 433, 441). *MacPherson's case* was followed by the High Court of Australia in *Buckle v. Bayswater Road Board* ((1936) 57 C.L.R. 259) (where two Judges held there was a distinction between a drain laid in the road purely for road purposes, and the case of a drain laid in or under the road for other purposes.) In *Andrews v. Merton and Morden Urban District Council* ((1921) 56 L.J. Newsp. 46), referred to in both *Beven on Negligence*, 4th Ed., 390, 434, and *Pratt and McKenzie on Highways*, 18th Ed., 412; *MacPherson's case* was distinguished. *MacPherson's case* ((1879) 4 App. Cas. 256) and *Buckle v. Bayswater Road Board* ((1936) 57 C.L.R. 259) are both distinguishable on the ground that in both the local body itself constructed and laid the drain. It will be contended for the respondent that there is authority which supports the proposition that it is misfeasance and not mere non-feasance for a local authority to place any artificial structure in the highway and then allow the highway to fall into disrepair: see *Salmond on Torts*, 10th Ed. 277; the authority usually cited being *White v. Hindley Board of Health* ((1875) L.R. 10 Q.B. 219); but it is distinguishable because the artificial structure was introduced by the local body itself. *White v. Hindley Board of Health* ((1875) L.R. 10 Q.B. 219) was cited to the Court in *Steel v. Dartford Local Board* ((1891) 60 L.J. Q.B. 256, 257), and, accordingly, *Steel's case* is good authority, notwithstanding the *Bathurst case* and *White's case* for the present submission, which it establishes and covers the present case.

C. The powers of the local body (the appellant) both in respect of the drain and the highway in question are permissive, and no liability can be imposed on it for failing to exercise such powers.

Dealing first with statutory powers relating to private drains: Refers to s. 229 1 (b) and (6) of the Municipal Corporations Act, 1933. There are a number of provisions relating to private drains which follow in ss. 231 and 232 and, no doubt, in ss. 353 and 354, which make it an offence for anyone to fail to carry out what the Council has power to direct; but, in respect of private drains, no statutory provisions can be found other than those which are relevant to repair. Such powers as are given to the Council by s. 229 are invariably introduced by the word "may" (see subs. (1), (2), and (6)); and under the other provisions of the Municipal Corporations Act, 1933, there is no provision that would enable the Council itself to repair this drain other than on default of the owner and on notice pursuant to subs. (6). Consequently, whatever

powers the appellant had in regard to the drain were permissive, and not obligatory.

[To *F. B. Adams, J.*: Section 242 (2) is confined in its terms, using the words "the property so destroyed or injured," which refer back to the words "wilfully or negligently destroyed." These powers are mere or permissive powers, and not obligatory. Under s. 175, the appellant would have had power to repair the hole in the footpath, and, as a necessary incident of that repair, to replace broken parts of the drain; but the power given by s. 242 (2) is a permissive power. Section 175 (4) (a) must of necessity give power to do anything necessarily incidental to the repair of streets. It is permissive and not obligatory.]

No action lies for failing to carry out a mere permissive power: *Salmond on Torts*, 10th Ed. 44. In the present case, the local body did nothing, so it is not a case in which it can be said to be negligent in exercising the power: see *East Suffolk Rivers Catchment Board v. Kent* ([1941] A.C. 74, 82, 85, 88, 90, 95, 102, 103; [1940] 4 All E.R. 527, 529, 531, 533, 535, 538, 543, 544); *Sheppard v. Glossop Corporation* ([1921] 3 K.B. 132, 145); *Smith v. Cawdale Fen, Ely (Cambridge), Commissioners* ([1938] 4 All E.R. 64); and *Gillet v. Kent Rivers Catchment Board* ([1938] 4 All E.R. 810) (all referred to in *East Suffolk Rivers Catchment Board v. Kent* ([1941] A.C. 74, 83, 84; [1940] 4 All E.R. 527, 530, 531).

The true principle upon which the immunity of the modern statutory local body for non-feasance in respect of the highway rests is that there is no liability for failure to exercise a mere power; and, in this connection, see *Municipal Council of Sydney v. Bourke* ([1895] A.C. 433, 439), to the effect that no action lies for the failure to exercise mere statutory powers.

D. That a borough corporation does not stand in such a relationship to the highway in the borough as to incur a common-law liability for failing to remedy a nuisance created in the highway by another: see *Salmond on Torts*, 10th Ed. 233, 235, 237; and, in particular, as to the liability on occupier, *Sedleigh-Denfield v. O'Callaghan* ([1940] A.C. 880; [1940] 3 All E.R. 349).

Consequently, a local body is neither an occupier nor a landlord in the circumstances of this case; and, indeed, it is not in a relationship to the hole or the drain which would give rise to liability for nuisances created by others. *Hall v. Beckenham* ([1949] K.B. 716, 717, 727; [1949] 1 All E.R. 423, 426) is distinguishable on the facts.

[To the Court: Section 274 (4) of the Municipal Corporations Act, 1900, was in terms similar to s. 229 (6) of the Municipal Corporations Act, 1933.]

Under s. 175 (4) (h) of the Municipal Corporations Act, 1933, any power of a local body to stop or close a street is subject to very stringent control in the matter set out in the Fifth Schedule to that statute: cf. *Lambeth Overseers v. London County Council* ([1897] A.C. 625, 630), and, in particular, the judgment of this Court in *Fortescue v. Te Awamutu Borough* ([1920] N.Z.L.R. 281, 283, 284, 290, 291, 296, 301; [1920] G.L.R. 214, 215, 218, 219) citing *Sanitary Commissioners of Gibraltar v. Orfila* ((1890) 15 App. Cas. 400); and see (1914) 30 *Law Quarterly Review*, 276, 283. *Fortescue's* case is a decision of this Court which covers the present case, and establishes that there is no liability; and see *Bank View Mills, Ltd. v. Nelson Corporation* ([1943] K.B. 337, 339, 341; [1943] 1 All E.R. 299, 301, 302) and, finally, *Crowley v. New-*

market Local Board ([1892] A.C. 345, 346, 348), where the question of nuisance was not specifically mentioned, but the facts are such that the question of nuisance and liability could not have been absent from the consideration of the Court; and that case illustrates, if it does nothing more, the present submission.

[Cooke, J. Were those submissions put to the learned Judge?]

Not as elaborately as here. The specific submission that no liability can be imposed upon a local body for failing to exercise statutory powers was not put to His Honour; but the others were as put, though not in the detail given here.

[F. B. Adams, J.: Perhaps that submission was implied?]

Yes. There was no duty imposed on the appellant to exercise mere permissive powers. His Honour's judgment is without support on the particular basis on which he holds the defendant liable. The defendant was entitled to judgment.

*Relling*, for the respondent. A series of cases has established that a local body has a different responsibility in relation to roads from its responsibility in relation to drains. It is misfeasance where a local body has constructed a drain on or about a road and has allowed the drain to fall into disrepair so that it is a source of danger by reason of which a person lawfully using the road suffers damage: *Borough of Bathurst v. MacPherson* ((1879) 4 App. Cas. 256). There have been many attempts since that case to explain it away but the actual decision, as based on nuisance, was expressly approved in *Municipal Council of Sydney v. Bourke* ([1895] A.C. 433); and the distinction is also shown in *Andrews v. Merton and Morden Urban District Council* ((1921) 56 *L.J. Newsp.* 466): see 16 *Halsbury's Laws of England*, 2nd Ed., 336. *In Gascoyne v. Wellington City Corporation*, ((1912) 4 N.Z.L.G.R. 168) *Sir Michael Myers, C.J.*, adopted the statement in *Salmond on Torts*, 9th Ed. 299. As the evidence in this case shows, the drain was an artificial structure introduced into the highway, and was not part of the highway itself: see *Buckle v. Bayswater Road Board* ((1936) 57 C.L.R. 259, 300). From those cases, it appears that immunity of local bodies for nuisance on highways is limited (apart from statute) to non-repair of highways as such. If the appellant in this case is liable, it would be liable in its capacity of drainage authority. The evidence shows that the earthenware pipe drain was not constructed for highway purposes, but purely for drainage of storm-water from the premises, 303 Jackson Street. It follows that this particular drain is an artificial structure having no relation to the highway as such.

The appellant is concerned with the efficient drainage of the borough: Municipal Corporations Act, 1933, ss. 221, 223; and it may cause storm-water drains such as this to be constructed. Under s. 223, it may cause to be constructed public drains; and under s. 229, private drains. This drain in question is vested in the appellant Borough Council by virtue of ss. 219 and 220 of the Municipal Corporations Act, 1933. The terms "drain", and "public drain" are defined in s. 260 of the Public Works Act, 1928. The definition in s. 220 of the Municipal Corporations Act, 1933, allows a narrower meaning to be given to the term "public drain." Under s. 220 a public drain can be one which, legally or not, has been under the control of the local body; and, in inserting that definition, the Legislature intended drains not constructed by the local body to vest in the local body in certain cases.

This drain is under the control of the appellant Borough because :  
(a) It is the only person or body who can in any way touch or interfere with the drain as it stands. It has specific power under s. 229 (6) to direct the owner to repair ; and under s. 242 (2), which gives the Council

5 itself power to repair in two ways, (i) the Council can repair where property has been wilfully or negligently damaged or injured ; and (ii) if it catches the offender it can recover the costs from him ; and those two powers are independent. (In this case, the appellant Borough itself has presumed that the damage to the drain was done by a lorry). Proof  
10 of wilfulness or negligence is not necessary before the local body can repair the damage ; there is nothing in s. 242 to stop the Council, where it thought the drain had been negligently damaged, and after repairing the drain, from taking the offender to Court to recover the cost. Under ss. 203 (c) and 24 (2) of the Municipal Corporations Act, 1933, it is an  
15 offence for other persons to interfere with such a drain as this ; and it would be impossible to touch this drain without first obtaining permission. There is no duty imposed by the Act itself on any owner or occupier to repair such a drain. He has no power, and he has no duty under the statute.

20 The Council repaired this particular defect (as the evidence shows) and that is sufficient to show that this drain has been within the control of the Borough. If that be accepted and it becomes a public drain, then it has become vested in the appellant by virtue of s. 219 ; and the appellant has thus become liable as a drainage authority for any  
25 nuisance, such as has arisen here : *24 Halsbury's Laws of England*, 2nd Ed., p. 87, para. 152. The occupier of land is liable for continuing a nuisance that exists on his land, even if, in certain circumstances, he did not cause the nuisance : *Sedleigh-Denfield v. O'Callaghan* ([1940] A.C. 880, 890, 904, 905 ; [1940] 3 All E.R. 349, 355, 365, 366) and see  
30 *Chapman v. Fylde Water Works Co.* ([1894] 2 Q.B. 599, 603, 607), which is analogous to the present case. On later legislation after that case, and proceeding *Batt v. Metropolitan Water Board* ([1911] 2 K.B. 965), it was laid down that there was an obligation on the householder to carry out such repairs. *Steel v. Dartford Local Board* ((1891) 60  
35 L.J.Q.B. 256) is distinguished for the reasons : (a) it was sought to hold the local body liable for negligent construction, while in this present case that course of action was abandoned as no evidence could be obtained as to the cause of the construction ; (b) the accident apparently occurred shortly after the hole developed and there was no allegation  
40 that the local body should have been aware of it, and the question never arose as to what would have been the defendant Board's position if such an artificial structure later collapsed, and the local authority left it in a collapsed condition : (c) *Steel's* case is no authority for the proposition that the control of such a drain-pipe would not vest in the local body.

45 It is not necessary, in order to fix the local body with liability, that it should itself have created the nuisance ; but there is a liability where it takes control of something artificial in its streets and allows it to remain there in such a state of repair that it is a nuisance : *Simon v. Islington Borough Council* ([1943] K.B. 188, 198 ; [1943] 1 All E.R. 41, 45) and see the  
50 reference therein to *Skilton v. Epsom and Ewell Urban District Council* ([1937] 1 K.B. 112 ; [1936] 2 All E.R. 50). In this case, the Petone Borough Council has taken control of this drain-pipe and has permitted the pipe itself to become a nuisance, and it is therefore liable in damages to the respondent : *Pollock on Torts*, 15th Ed. 317.

55 The powers set out in the Municipal Corporations Act, 1933, regarding

drainage are conferred in permissive language; but, in certain circumstances, permissive words may be construed as mandatory, and, therefore, become duties; *Craies on Statute Law*, 5th Ed. 263, 264. In a case such as the present where the local body is responsible for the efficient drainage of the Borough, and there appears no other power to force an abatement of a nuisance arising in connection with drainage, then those permissive powers to repair, or to give notice to repair, should be interpreted as being mandatory, and as creating a duty to exercise its powers to abate the nuisance. *East Suffolk Rivers Catchment Board v. Kent* ([1941] A.C. 74; [1940] 4 All E.R. 527) is distinguishable as the land-owners in that case who were complaining themselves had power to do the work to abate the nuisance; in this case, the householder had no power. In *Hall v. Beckenham Corporation* ([1949] K.B. 716; [1949] 1 All E.R. 423) no real distinction is drawn between parks and highways or streets in the borough: the local bodies here have certain powers of control over both, and the only difference seems to be one of degree.

If there was no responsibility on local bodies as occupiers of streets, in the sense that they could not control nuisances created by unknown persons, it would have to follow that in any case where any unknown person created a nuisance on a highway or street within the control of a local body (such as digging a dangerous hole in it), and where the local body knew of the hole perhaps through a succession of accidents, there would still be no claim against the local body by those who suffered from the nuisance. As far as private occupiers are concerned, *Sedleigh-Denfield v. O'Callaghan* ([1940] A.C. 880; [1940] 3 All E.R. 349) covers such a position; and it should follow that local bodies, where they are drainage authorities, are liable for controlling the nuisance after it has come to their knowledge: see *Simon v. Islington Borough Council* ([1943] K.B. 188, 198; [1943] 1 All E.R. 41, 45).

*On the cross-appeal:* By virtue of s. 3 (6) of the Contributory Negligence Act, 1947, referred to in *Helson v. McKenzies Ltd.* ([1950] N.Z.L.R. 878, 921; [1950] G.L.R. 388, 407) it is for the jury to determine the total damages and any reduction therefrom. In the present case, contributory negligence was not pleaded; it was not argued; and no submissions were made on it. Admittedly, questions of fact over and above the issues that were put to the jury were left to the learned trial Judge to determine; but there was no consent (as there was in *Helson's* case) by the parties to any questions of contributory negligence being decided by him; and it was not so intended. Contributory negligence should be pleaded by the defendant: *Bullen and Leake's Precedents of Pleadings*, 10th Ed. 794, and see R. 128 of the Code of Civil Procedure. Contributory negligence is an affirmative defence: *Williams on Joint Torts and Contributory Negligence*, 386. It is a general practice in New Zealand to include contributory negligence in a statement of defence. The learned Judge was wrong in taking the question of contributory negligence into his own hands at the stage of the proceedings when he did; and, as the jury found for the plaintiff and raised no questions on the issue, the verdict of the jury should be restored. If that be not accepted, then, as a matter of fact, His Honour was wrong in holding that the respondent was guilty of contributory negligence: *Davies v. Swan Motor Co. (Swansea), Ltd.* ([1949] 1 All E.R. 620, 632 (referred to by Gresson, J., in *Helson's* case ([1950] N.Z.L.R. 878, 921, 1. 33; [1950] G.L.R. 388, 407)); and see *Lord Cockburn, C.J., in Thompson v. North*



*Eastern Railway Co.* (1860) 2 B. & S. 106, 115; 121 E.R. 1012, 1016) gives the test to be applied in this case. His Honour has misdirected himself on the point (*ante*, p. 313, l. 41), because the plaintiff's seeing a hole several times in a period of six months was not such as would put a prudent man on his guard in the circumstances in which this accident occurred. The accident happened at 10.30 p.m., after a visit to a picture theatre, and the lighting was not good. Further, the particular hole was close to the kerb; and it is not as though it was a type of obstruction extending across a footpath, which every prudent man, after seeing once, would carry in his mind. The respondent was in a position of ordinary manoeuvre, attempting to pass slower-moving pedestrians. On these facts, it was unreasonable to attribute to the respondent a lack of prudence or care of his own safety.

*Shorland*, in reply. It was submitted by Mr. *Relling* that the drain was a drain vested in the local body, and he founded his submission on the provisions of ss. 219 and 220 of the Municipal Corporations Act, 1933. Before he can bring under s. 220 a drain that is not a public drain shown on the drainage map, he must first bring evidence proving that the drain in question has been in the *de facto* control of the local body for not less than twenty years. Furthermore, s. 229, which deals with private drains, is careful in its choice of language when it refers to the type of drain that a householder can be called upon to lay. Sections 219 and 220, referring to and using the words "public drain", cannot be construed as governing another type of drain dealt with in the Act and named as a "private drain", and, accordingly, the submission fails. Alternatively, even if the drain were now vested in the local body, the authorities to which Mr. *Relling* referred, and on which he relied, without exception relate to drains which the local body has itself constructed and placed in the highway. *Chapman v. Fylde Water Works Co., Ltd.* ([1894] 2 Q.B. 599), considered in *Batt v. Metropolitan Water Board* ([1911] 2 K.B. 965, 971, 974), is a decision which must be confined to its own particular facts and the particular statute that was relevant to that case; it is clearly distinguishable, and the judgments show that the learned members of the Court of Appeal were insistent that *Chapman's* case was a decision on its own particular facts and statute, and had no general application. When a householder is called upon by the local body under s. 229 of the Municipal Corporations Act, 1933, or under any similar section which may have obtained in earlier Acts, to lay a storm-water drain from his house to the street channels, then, in substance, he receives what in effect is an easement to lay a water-pipe or drain-pipe from his house across and under the footpath; or, perhaps, it may more correctly be said to be a licence than a true easement; and it is well established that a right to lay water-pipes through the land of another carries with it the right to enter that land for purposes of maintenance, etc. If a local body pursuant to the statutory power given by s. 229 calls on a householder and, therefore, gives him the right to lay pipes under the footpath, there is none the less a licence granted which is indistinguishable from the licence which the owner of a servient tenement may grant in the case of private land; and, if that be well founded, then there is no question in regard to the right of repair as incident to such licence: *Goodhard v. Hyett* (1883) 25 Ch.D. 182, 186, 187) which refers also to *Pomphrey v. Ricroft* (1669) 1 Saund. 321, 323; 85 E.R. 454, 459). Once it is established there is a right in the householder to repair the pipes, there can be no question of his contravening s. 203 of the Municipal Corporations Act, 1933. *Simon v. Islington Borough*



*Council* ([1943] K.B. 188, 198; [1943] 1 All E.R. 41, 45) is distinguishable; and the statement therein (*ibid.*, 196, 197; 44) is *obiter dicta* in so far as it relates to *Skilton's* case ([1937] 1 K.B. 112; [1936] 2 All E.R. 50) as that case did not go to the length which the statement suggests, as the basis of *Skilton's* case was that the defendant itself had inserted the artificial structure in the surface of the roadway, and it had done so for traffic purposes, so that the stud stood in the same position as would any other traffic sign.

*As to the cross-appeal*: It is admitted that there was no thought, when issues were settled and the agreement made that other questions of fact were for His Honour, that there was any issue in relationship to contributory negligence to be determined. Without hesitation, Mr. *Relling's* statement that he would not have knowingly agreed to an issue of contributory negligence being taken from the jury and determined by the learned trial Judge, is accepted.

As to whether contributory negligence must be pleaded or not: see *Wakelin v. London and South Western Railway Co.* ((1886) 12 App. Cas. 41, 51, 52).

[*Cooke, J.*: There was never a mention of the words contributory negligence in the lower Court hearing?]

That is correct. The pleading was deliberate, and a decision was made against pleading contributory negligence.

*Cur. adv. vult.*

HUTCHISON, J. I am in agreement with *F. B. Adams, J.*, (*post*, p. 327) whose judgment I have had the opportunity of reading, that the appeal should be allowed.

I would like, however, to add to what he has written, with which I am in general agreement, one or two observations of my own.

I think that the view of the learned trial Judge, on which he held that the appellant was under a duty to abate the nuisance that existed with the hole in the footpath, was that there was such a duty resting on it by virtue of the combined effect of the provisions of the Municipal Corporations Act, 1933, with regard to drainage and the common law. That I think appears from the passage in the judgment: "In my view, a general survey of the provisions of the Municipal Corporations Act with regard to drainage shows that the streets are vested in the defendant under s. 175 of the Municipal Corporations Act, 1933, for the purposes of drainage, as well as for use as highways and other purposes. It follows that as a drainage authority it is the owner of the soil so far at least as the ownership is necessary for drainage purposes. There is no doubt as to the liability of private owners to an action for nuisance where they create a danger of this kind alongside a highway: 24 *Halsbury's Laws of England*, 2nd Ed. 149. Public bodies are liable for nuisances in the same way as other persons are liable unless protected by statute, or in cases of non-feasance while acting in their capacity as surveyors of highways (*ibid.*, para. 152)" (*Ante*, p. 311, l. 53).

For the reasons given by my brother *Adams*, (*Post*, p. 327), I think that there was no duty imposed on the appellant by the drainage provisions of the Municipal Corporations Act.

As to the common law: paragraph 152 of 24 *Halsbury's Laws of England*, 2nd Ed., cited in the passage quoted from the judgment sets out:

Public bodies in whom property or works are vested for public purposes, whether for profit or not, are liable for nuisances in the same way as other persons are liable, unless protected by statute; but local authorities acting in the capacity of surveyors of highways are not liable for nuisance by nonfeasance in that capacity.

- 5 (The italics are mine). It was, in my opinion, the drain, not the street, that was the "property or works" in this case, and, as my brother Adams shows, the drain was not vested in the appellant. In my opinion, with great respect to the view expressed by the learned trial Judge, the drainage provisions of the Municipal Corporations Act did not impose  
10 such a duty on the appellant nor did the common law, nor did the two combined. In *Hall v. Beckenham Corporation* ([1949] 1 K.B. 716; [1949] 1 All E.R. 423) though the plaintiff failed in imposing liability on the defendant, *Finnemore, J.*, thought that the Corporation might well have been liable if it had had power to prevent the nuisance alleged,  
15 that of creating considerable noise by the flying of model aircraft. That, however, was not a highway case. In *Skilton v. Epsom and Ewell Urban District Council* ([1937] 1 K.B.112; [1937] 2 All E.R. 50), the local authority had introduced the studs into the road surface in its capacity as transport authority and not in the capacity of highway authority in the ordinary sense. It had caused the nuisance. That  
20 case, in my respectful opinion, does not bear on the present one, as the appellant here did not introduce the drain into the road and did not cause the nuisance. For the same reason, *Borough of Bathurst v. Macpherson* (1879) 4 App. Cas. 256), to which case Lord Herschell was referring when he made the comment in *Municipal Council of Sydney v. Bourke* ([1895] A.C. 433) that is quoted in the judgment under review, in my opinion, does not bear on the present case.

- In *Simon v. Islington Borough Council* ([1943] K.B. 188; [1943] 1 All E.R. 41), cited for the respondent, the Islington Corporation had  
30 not itself introduced the tram rails into the road surface, but the effect of the statutory provisions was that it had succeeded to the obligations of the London Passenger Transport Board, which had in turn succeeded to the statutory obligations of the tramway promoters who had so introduced them.

- 35 The removal of the danger that had developed on the footpath was primarily a highway matter; and, as the appellant did not introduce the drain into the street and the drain was not vested in the appellant and there was no duty on the appellant as drainage authority to repair it, the liability of the appellant, if any, must, in my opinion, be determined on the law applying to it as highway authority; and on that  
40 law it is not liable for its non-feasance.

I agree that the judgment of the Court should be as proposed by *F. B. Adams, J.*

- COOKE, J. The facts of this case and the course of proceedings  
45 in the Supreme Court are stated in the judgment of *Fair, J.* (*ante*, p. 308), and it is unnecessary to repeat them. The defendant, having at the conclusion of the evidence for the plaintiff moved for judgment, or, alternatively, for a nonsuit and having renewed those applications at the end of the evidence, repeated them after verdict by a formal notice  
50 of motion, the grounds of which are stated in the judgment of the learned Judge. Upon that motion and upon the plaintiff's contemporaneous motion for judgment, the learned Judge delivered his judgment on February 9, 1953, dismissing the applications for judgment for the defendant, and, alternatively, for a nonsuit and entering judgment for

the plaintiff for the amount of the jury's verdict reduced by one-third as a result of the attribution to the plaintiff of that proportion of the responsibility. From that the defendant has appealed, and the plaintiff has cross-appealed against so much of the judgment as assigns blame to him.

The conclusions at which the learned Judge arrived on the question of the liability of the defendant, in substance, were, first, that, the drain having been installed for purposes other than the use of a highway as a highway, the sole question for decision was whether the defendant is liable not as a highway authority but as a drainage authority; secondly, that the defendant did not construct the drain but, as a drainage authority, consented to its construction; and, thirdly, that in its capacity as a drainage authority it is liable on the ground that, in the circumstances, not only was it the owner of the soil on which the drain rested—so far, at least, as ownership was necessary for drainage purposes—but the drain remained under its control and that, therefore, upon the common-law principles that regulate the liability of landlords and occupiers for nuisance, it is responsible for the nuisance caused by the destruction of the drain. The learned Judge also referred to the question as to whether the defendant could be liable as a drainage authority on the ground that it was negligent in failing to exercise its statutory power to call upon the owner of the premises to repair the drain. Holding, however, as he did, that the defendant is liable for the nuisance on the ground of ownership of the soil and control of the drain, he did not consider it necessary to express any opinion on the question of a right of action against it for breach of its duty to exercise that statutory power, although he did treat the existence of that statutory power as showing that the drain was under its control.

Before us, counsel for the plaintiff accepted, and I think rightly accepted, the first of the learned Judge's conclusions. Moreover, I did not understand him to contest the second of those conclusions; but upon it I shall say a word or two in a moment to indicate my reasons for agreeing with it. Mr. *Relling* did, however, put in the forefront of his argument the ground upon which *Fair, J.*, held the defendant liable, its responsibility in nuisance, and he also sought to fasten the defendant with liability on the ground upon which the learned Judge found it unnecessary to express an opinion, its breach of statutory duty in failing to call upon the owner to repair. The argument for the defendant, in short, was that it is not liable on either of those grounds.

The second conclusion is directed to the circumstances under which the drain was constructed. It is, therefore, desirable first to say something about the history and the nature of the drain. It was constructed on some date before 1905 in order to take away the storm water from the privately-owned building at No. 303 Jackson Street, Petone, and to discharge it into the street channel. The defendant has, however, no knowledge or record of who constructed it and there is no evidence before the Court as to who did. Section 229 of the Municipal Corporations Act, 1933, contains provisions authorizing a Council to require an owner to lay a private drain from any undrained land and to connect such private drain with any street channel and authorizing the Council, on his failure to do so, to cause the work to be done and recover the cost from him. Provisions that are the same for all present purposes were contained in s. 274 of the Municipal Corporations Act, 1900, which was in force between 1900 and 1908. The provisions of the Municipal Corporations Act, 1886, were somewhat different; but it is unnecessary

- to consider what the position would have been if the drain now in question had been constructed while they were in force because the onus of proving the date when and the circumstances under which the drain was constructed lies on the plaintiff and, as he is able only to prove that the drain was constructed before 1905 and is unable to adduce any evidence as to whether construction took place before or after the date when the Act of 1900 came into force, October 18, 1900, the defendant is, as I think, entitled to say, as it in effect does, that, the construction of the drain between 1900 and 1905 not having been shown by the plaintiff to have been any less probable than its construction at some earlier time, the plaintiff is not entitled to have the case determined on any other basis than that construction took place between 1900 and 1905. So approaching the matter, I think the proper inference to draw from the evidence before the Court—or rather from the lack of evidence—and from the fact that, during that period, s. 274 of the Act of 1900 was in force is that the then owner of the premises constructed the drain either in response to a notice from the Council given under that section or on his own initiative with the permission of the Council. In the former event, as well as in the latter, the Council can properly be said to have consented to its construction.

- The learned Judge's third conclusion, in effect, is that liability in nuisance rests on the defendant as a result of a combination ownership, which enabled the defendant to consent to the construction of the drain, and control, which sprang from its powers under s. 229 of the Act of 1933. It is plain that a local authority may be both a highway authority and a drainage authority and that its liability depends upon the particular capacity in which it committed the act or omission complained of: see, for instance, *White v. Hindley Local Board of Health* ((1875) L.R. 10 Q.B. 219); *Buckle v. Bayswater Road Board* ((1936) 57 C.L.R. 259).
- From that point onwards, however, the authorities are not always easy to reconcile, but, in my opinion, they show that, apart, of course, from some special statutory provision, a sewerage or drainage authority is not liable in nuisance for the dangerous state of sewers or drains in a highway unless (1) it constructed them: *Borough of Bathurst v. Macpherson* ((1879) 4 App. Cas. 256, 267) (as to which see *Municipality of Pictou v. Geldert* ([1893] A.C. 524, 531) and *Municipal Council of Sydney v. Bourke* ([1895] A.C. 433, 441); *Steel v. Dartford Local Board* ((1891) 60 L.J.Q.B. 256); *Buckle v. Bayswater Road Board* ((1936) 57 C.L.R. 259); *Skilton v. Epsom and Ewell Urban District Council* ([1937] 1 K.B. 112, 124; [1936] 2 All E.R. 50, 58 per Slesser, L.J.); *Simon v. Islington Borough Council* ([1943] K.B. 188; [1943] 1 All E.R. 41) (where it was held that a positive and active step taken by the Council to keep certain disused tramway tracks *in situ* was equivalent to the original construction of them and, therefore, that its liability was no less than if it had originally constructed them); or (2) it is the owner of them: *White v. Hindley Local Board of Health* ((1875) L.R. 10 Q.B. 219) (approved in *Borough of Bathurst v. Macpherson* ((1879) 4 App. Cas. 256, 266)); *Skilton v. Epsom and Ewell Urban District Council* ([1937] 1 K.B. 112, 122, 123; [1936] 2 All E.R. 50, 56, 57, per Slesser, L.J.); or (3) it has the control or management of them: *Borough of Bathurst v. Macpherson* ((1879) 4 App. Cas. 256, 265); *Thompson v. Mayor, etc. of Brighton* ([1894] 1 Q.B. 332, 344, per Dawley, L.J.). Upon this last point it is useful also to refer to *Hall v. Beckenham Corporation* ([1949] 1 K.B. 716; [1949] 1 All E.R. 423). It is not a highway case, but is, I think, of assistance for present purposes on the question of liability on the basis of control or management.

It is necessary, then, to consider whether the circumstances of the present case bring it within any of the three categories just mentioned. As to the first, it cannot be inferred that the defendant itself constructed the drain ; and, even if its construction by the then owner of the premises—and, as I have already said, I think it must be inferred that he constructed it—took place in compliance with a notice from the Council given under s. 274 (1) (a) of the Act of 1900, such construction would not, in my opinion, have constituted construction by the defendant within the meaning of the decisions that treat construction as a ground of liability : see *Steel v. Dartford Local Board* ( (1891) 60 L.J.Q.B. 256, 10 257).

Upon the question of ownership of the drain, it is necessary to refer to the plaintiff's contention that the drain had become a public drain. The importance of that contention is that, if the drain was a public drain, it by that very fact became vested in the corporation : see s. 219 of the Municipal Corporations Act, 1933. I think, however, that the provisions contained in subs. (1) (a) of s. 229 of the Municipal Corporations Act, 1933, and in s. 274 (1) (a) of the Municipal Corporations Act, 1900, and in the corresponding sections in the intervening Acts of 1908 and 1920 show that the drain in question here is a private drain within the meaning of the legislation ; and, whatever may be the precise meaning and effect of s. 220 of the Municipal Corporations Act, 1933, which provides that every drain in a borough that has actually been under the control of any borough council for not less than twenty years as a drain shall be deemed to be a public drain, there is no evidence here of anything having been done by the Council under s. 274 of the act of 1900 or under the successors of that section or under any other power that could have constituted actual control within the meaning of s. 220 of the Act of 1933. In my opinion, therefore, the drain has not become a public drain and is thus not vested in the Council by virtue of s. 219 of the Act of 1933. It is not suggested that there is any other way in which the Council could be the owner of the drain. 15 20 25 30

The third class of case mentioned above relates to the question of control and management. The only powers of the Council over the drain that require consideration upon this aspect of the matter are those contained in subss. (1) (b) and (6) of s. 229 of the Act of 1933. I have had the opportunity of reading and considering the judgment of my brother *Adams* (*post*, p. 326) and I agree with him that, for the reasons he gives, the provisions of subs. (1) (b) do not impose a duty, as distinct from a discretionary power, to give notices to owners requiring them to repair their private drains. I think it is also clear that the provisions of subs. (6) operate in a similar way : indeed, the view that they do not impose a duty was, I think, not challenged, and is, in fact, emphasized by the presence of the words "if it thinks fit." Nor is it suggested that the defendant was itself under any duty to repair arising otherwise than under subs. (6) of s. 229. In my opinion, the provisions of subss. (1) (b) and (6), construed in this way, fall short of showing that the drain was under the control or management of the defendant within the meaning of the decisions. 35 40 45

I take the view, then, that the present case does not fall within any of the three categories I have mentioned. Moreover, as the defendant is not the owner nor has the control or management of the drain, it is not necessary to consider the further question whether the principles that govern the liabilities of occupiers and landlords for nuisance extend to a sewage or drainage authority in whom is vested the ownership, con- 55

trol or management of sewers or drains: but I would not wish to be regarded as assenting to the view that this question should receive an affirmative answer.

- The defendant being, as I think, free from liability in nuisance, it is necessary to consider whether it is liable on the ground of breach of statutory duty by reason of its failure to exercise its statutory powers under s. 229 (1) (b). I think that the answer to any such suggestion is that those provisions do not impose a duty on the defendant.

- I think it is desirable to say a word about *Chapman v. Fylde Waterworks Co., Ltd.* ([1894] 2 Q.B. 599) which was cited and relied on for the plaintiff, and which related to the non-repair of a cover or guard-box let into the pavement by the waterworks company to protect a stop-cock it had placed there. The claim there was based on negligence and the Court of Appeal held that the company was under a duty to repair the cover. The ground upon which *Lord Esher, M.R., and Kay, L.J.*, proceeded was that, as under the legislation the company alone had power to repair it, there was a duty upon it to do so, while *A. L. Smith, L.J.*, held that, upon the true construction of the legislation itself, the company was subject to that duty. That decision was thus based on the existence of a duty to repair. In the present case, the defendant was under no duty to call upon the owner to repair under subs. (1) (b) of s. 229 of the Municipal Corporations Act, 1933, and it is not suggested that it was itself under any duty to repair either under subs. (6) of that section or otherwise. The decision in *Chapman's case* ([1894] 2 Q.B. 599) does not, therefore, assist the plaintiff upon either of the heads under which his case is put.

I am for allowing the appeal and consequentially dismissing the cross-appeal, and I agree with the orders as to costs that are proposed in the judgment of my brother *Adams*.

- 30 F. B. ADAMS, J. The judgment under review exonerates the appellant from liability in its capacity as a highway authority; and, there being no evidence of any misfeasance on its part, I respectfully agree. But the learned Judge has held the appellant liable in its capacity as a drainage authority. The drain is an ordinary storm-water drain constructed from a building and running across and under the footpath to the street-channel. At some unknown date about six months before the accident to the respondent, the concrete kerbing of the street-channel and the adjacent end of the drain were broken by some unknown means—probably by the wheel of a heavy vehicle negligently driven. The respondent and others observed the resulting hole at the edge of the footpath, and watched it growing slowly as month succeeded month; but no one thought of informing the appellant or any of its officers or servants until after the accident. The drain and footpath were then promptly repaired.

- 45 Apart from these facts, nothing whatever is known as to the history of the drain except that it was constructed before 1905. There is no ground for supposing that it was constructed by, or at the instance of, the appellant, but it may be proper to assume, as the learned Judge did—on the supposition that it could not be lawfully constructed without the appellant's consent—that such consent was given. The work of forming and asphaltting the surface of the footpath over the drain and the construction of the kerb and the outlet through the kerb must necessarily have been done by the appellant, and the appellant has, no doubt, also attended to the subsequent maintenance of the footpath

and the kerb. But these things were done in its capacity as a highway authority; and it will be observed that nothing whatever is proved to have been done by it in its capacity as a drainage authority, except, perhaps, that it may many years ago have given an express or implied consent to the construction of the drain.

In the Supreme Court, Mr. *Relling*, as counsel for the respondent, endeavoured to found liability on the contention—rejected by the learned Judge but renewed before us—that the drain is a “public drain” within the meaning of the Act by virtue of s. 220, and is accordingly vested in the Borough Council by s. 219. What s. 220 requires is that the drain shall have been “actually, and whether legally or not, under the control of any Borough Council . . . for not less than twenty “years as a drain,” in which event it is to be deemed to be a public drain under the Act. With respect, I would hesitate to accept the learned Judge’s view that the operation of s. 220 must be limited to drains that are in their nature used for public drainage, or are such that it is the recognized duty of a Borough Council to provide them. It seems to me that drains of those descriptions would naturally fall within the words quite apart from s. 220. Under s. 233, a Borough Council may declare any “common private drain” to be a public drain; and I think it must follow that a common private drain may also become a public drain under s. 220 by virtue of actual control for not less than twenty years. There is no apparent reason why a private drain other than a common private drain may not be similarly affected by s. 220, though it might require stronger evidence to show that the Borough Council had exercised actual control. I doubt, therefore, whether s. 220 can be limited in the way suggested by the learned Judge. But it is enough for the purposes of this case to say that this drain is not a public drain within the ordinary meaning of the words, and that, in the absence of any evidence of actual control for twenty years, s. 220 does not make it such. I do not think it can be said that a drain of this kind is under the “actual control” of a Borough Council merely because it is in a street, or because the Borough Council may have certain powers exercisable in respect of it, or because the consent of the Borough Council may be necessary to enable anyone else to repair it. What is necessary is control actually and consciously exercised for the required period; and, in the present case, no act of control was proved other than the repair of the drain after the accident to the respondent—a repair which consisted merely in replacing the broken pipe at the end of the drain, and which was done rather for the purpose of repairing the footpath than with a view to repairing the drain. There was some evidence that the appellant had repaired similar drains in the past, but this is not enough to fix it with actual control of all such drains, or to prove such control over the necessary period. I am, therefore, in respectful agreement with the learned Judge’s view that this is a private and not a public drain.

What I have already said is sufficient to distinguish the reported decisions in which public authorities have been held liable in respect of defective drains or other artificial structures placed in or under roads or streets and constructed by or vested in such authorities. I refer in particular to such cases as *White v. Hindley Local Board of Health* ((1875) L.R. 10 Q.B. 219); *Borough of Bathurst v. Macpherson* ((1879) 4 App. Cas. 256); *Papworth v. Battersea Corporation* ([1914] 2 K.B. 89); *Skilton v. Epsom and Ewell Urban District Council* ([1937] 1 K.B. 112; [1936] 2 All E.R. 50); and *Simon v. Islington Borough Council* ([1943] K.B. 188; 55



[1943] 1 All E.R. 41). The question here is a different one—namely, whether the appellant is liable for the non-repair of a private drain which was not in any sense its drain, and in respect of which it had done nothing. I shall examine, first, the grounds on which the learned Judge has held the appellant liable, and then deal with an alternative ground suggested by Mr. *Relling*. But, before doing so, it is desirable to refer briefly and by way of preamble to the provisions of the Act.

There is no general provision vesting general control of drainage in a Borough Council, or expressly imposing on a Borough Council any general duty to provide or control drainage. What is done is done piecemeal by conferring specific and particular powers, and, with one exception, everything is in permissive form, the word "may" recurring time and time again like a keynote. (The exception is not important: it is contained in s. 222, which requires a Council to prepare a drainage map of existing or intended drains, with the addendum that it "may" cause new drains or alterations to be marked on the map.) Public drains are vested in the Corporation (s. 219), and include drains actually controlled for twenty years (s. 220). The Council "may" provide buildings and plant for the efficient drainage of the borough (s. 221). It "may" cause to be constructed the drains shown on the map, or, until there is a map, such drains as it thinks needful, whether upon or under streets and public places or upon or under private lands or buildings (s. 223 subs. 1). This is, no doubt, the cardinal provision, and is in form no more than a power to construct such drains. Section 223 (3) originally provided that the Council "may" alter, renew, repair and cleanse "any drain so constructed"; but the last four words have been amended to read "any public drain," thus giving power to repair, not only drains so constructed, but any public drain. There is no similar express power enabling the Council in general terms to repair private drains. The Council "may" erect buildings and other works and things in connection with drainage in, upon or under streets or public places (s. 225). It "may" do certain things with regard to streams and water-courses (ss. 226 and 227). There is a great deal more in similar vein but irrelevant for present purposes. By s. 229, the Council is empowered to require the owner of any land or building to do various things in connection with private drains, and, on default of the owner, to cause them to be done, and recover the cost from him. I quote the opening portion of this section as it is the basis of the learned Judge's decision:

(1) In respect of any land or building within the borough the Council may, subject to subsection seven hereof, by notice in writing, require the owner thereof to do all or any of the following things:

(a) To provide, construct, and lay a private drain from any land or building which is not drained by some pipe or drain to the satisfaction of the Council, and to connect such private drain with any public drain or covered watercourse or street-channel or the sea, as the Council thinks fit:

(b) To cleanse and repair or to relay or alter the course, direction, and outfall of any existing private drain of or belonging to such premises:

It will be observed that these provisions enable the Council to compel the property owner to construct or to repair a drain of the kind now in question, and that this must necessarily involve a right in the owner to do those things when required, even though the work may necessitate interference with the footpath or the street. The provisions are not limited to storm-water drains, but must include sewage drains as well. Provisions similar to those contained in s. 229 appeared in s. 274 of the



Municipal Corporations Act, 1900, and have been repeated in each of the intervening enactments. Before the Act of 1900 there was no such provision, and it is impossible, therefore, to say whether such provisions were in force or were relied upon when this particular drain was constructed.

There is only one other relevant provision relating to the repair of private drains. It is contained with other matter in s. 242, and its effect is that the Council "may" replace or repair any private drain that has been wilfully or negligently destroyed or injured, and may recover the cost from the offender.

The foregoing is not an exhaustive analysis of the statute, but is sufficient for the purposes of this case. In regard to the repair of private drains—a matter which presents obvious difficulties when such drains are constructed in a street—the statute is curiously silent. The repair of a private drain, and particularly of a sewage drain, may involve extensive interference with the street. Where a Borough Council proceeds under s. 229, its consent to such interference, and the right of the owner to interfere with the street to the required extent, may be taken as necessarily implied. But what is the position where the Borough Council does not proceed under that section? May the owner effect necessary repairs without the consent of the Borough Council, and what is his position in regard to any resulting nuisance pending consent or if such consent be refused? These questions do not arise directly in this case, but, in his contention discussed below, Mr. *Relling* relied on the fact that, apart from s. 229, the Act does not expressly impose any duty, or confer any power, on the property owner to repair a private drain of this kind. But it must be remembered that there is equally no duty or power in that behalf expressly imposed or conferred on the Borough Council.

It has not been suggested that the appellant is liable merely by reason of the construction of the drain under the footpath, whether with or without its consent. As the drain may have been lawfully constructed by the owner, and there is no evidence that it was constructed by, or on the requisition of the appellant, the latter cannot be held liable on any supposition that it constructed the drain itself or required the owner to construct it; and nothing need be said as to possible liability in either of those events.

The grounds upon which the learned Judge has held the appellant liable may, I think, be stated in the following propositions:

1. That s. 229 (1) (b) is not merely an empowering section but imposes on the Borough Council a legal duty binding it, if disrepair causes a nuisance to the highway, to exercise the power of requiring the owner to repair:

2. That, the streets and their management and control being vested in the Borough Council for purposes which include drainage, it is liable—on the same principles as apply in the cases of occupiers of land, or public authorities having the management and control of lands, or landlords who have reserved rights enabling them to abate nuisances—if, by the failure to exercise this power, it permits the continuance of a nuisance such as this: and

3. That the liability is not confined to nuisances known to exist but extends also to those of whose existence the Borough Council ought to have known and must, therefore, be presumed to have known.

The learned Judge expressly refrained from deciding whether a breach of the duty referred to in the first proposition would in itself give rise to

a right of action based on negligence; but his judgment, nevertheless, rests on the existence of this duty as founding his view on the crucial point that the drain "remained under its (the appellant's) control" because (1) it had licensed its placing upon the highway, and (2) it "had the power and the duty to see that it was kept in repair." He made no suggestion that it had such power or duty apart from s. 229 (1) (b); and, as will appear, I am in agreement on that point.

As I am, with all respect, unable to accept the first of those three propositions, it is unnecessary to discuss the other two. I desire, however, to guard myself against the supposition that they are accepted. The idea that a Borough Council is, in relation to nuisances arising on its streets, in a position similar to that of an occupier seems novel, and seems also to be contrary to what was said in *Municipal Council of Sydney v. Bourke* ([1895] A. C. 433, 439-440), and *Fortescue v. Te Aumutu Borough* ([1920] N.Z.L.R. 281; [1920] G.L.R. 214). But the matter need not be discussed, as it was not suggested by the learned Judge or by counsel in argument that liability could be rested simply on the ground that the street was vested in or under the control of the appellant. It was the combination of this with the supposed duty that was relied on, and, if the duty is rejected, the argument falls. The third proposition also is one that may be open to doubt, as it postulates a duty of an onerous kind requiring a Borough Council to exercise vigilance in order to discover defects in private drains in its streets. I need, however, express no opinion about it.

But there can be no liability here on the grounds suggested by the learned Judge unless s. 229 (1) (b) is construed as imposing a legal duty to exercise the power thereby conferred on all appropriate occasions. What the statute says is that the Borough Council "may" require the owner to repair. The learned Judge has invoked the principles set out in *31 Halsbury's Laws of England*, 2nd Ed., pp. 529, 530, para. 692, where there are statements to the effect that permissive words conferring a power may import a statutory obligation to exercise it—a proposition which is not open to criticism—and that, broadly speaking, this is so in the case of public statutes where the thing to be done is for the public benefit or in advancement of public justice. This latter statement is, however, almost a verbatim transcription of the dictum of *Coleridge, J.*, in *R. v. Tithe Commissioners* (1849) 14 Q.B. 459; 117 E.R. 179) which did not meet with acceptance in the leading case of *Julius v. Lord Bishop of Oxford* (1880) 5 App. Cas. 214) and which must be read in the light of what was there said. After referring to the dictum and its supposed elevation into an established canon of construction, *Lord Cairns* said: "My Lords, the cases to which I have referred appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised" (*ibid.*, 225).

(The italics are mine). *Lord Penzance* spoke of it as "a somewhat loose definition" (*ibid.*, 230) and added: "It is surely not enough that the thing empowered to be done should be for the public benefit, in order to make it imperative to exercise that power on all occasions falling within the statute" (*ibid.*, 230).

*Lord Blackburn's* view of the supposed axiom may be gathered from the following passages in his speech: "The only part of this to which

"exception can be taken is the use of the word 'public'; if by that  
"it is to be understood either that enabling words are always compulsory  
"where the public are concerned, or are never compulsory except where  
"the public are concerned, I do not think either was meant . . . But  
"I cannot agree with the Court of Queen's Bench, that whenever the  
"statute is for the public good, and of general interest and concern,  
"powers conferred by enabling words are, *prima facie*, to be considered  
"powers which must be exercised" (*ibid.*, 244, 245).

It is accordingly not enough that the power is conferred in the public  
interest or for the public benefit. What is required was authoritatively  
stated in the classical passage in the opinion of Lord Cairns (*ibid.*, 222, 223).  
I refrain from quotation, but its purport is that those who allege a duty  
to arise from merely permissive words must show something in the nature  
or object of the power, or in the conditions under which it is to be exer-  
cised, or in the title of the persons for whose benefit it is to be exercised,  
sufficient to show that the power is coupled with a duty.

I can see no sufficient ground for inferring that s. 229 (1) (b) was in-  
tended to impose a duty, as distinguished from a discretionary power,  
to give notices to owners requiring them to repair their private drains.  
When the case of *East Suffolk Rivers Catchment Board v. Kent* ([1941]  
A.C. 74; [1940] 4 All E.R. 527) reached the House of Lords, it was con-  
ceded that the statutory power to repair the sea wall did not impose a  
duty to undertake such repair. The contention that there was such  
a duty had been rejected by Hilbery, J., in the Court of first instance  
([1939] 2 All E.R. 207), and there can be no doubt that this met with  
the approval of their Lordships. One may accordingly rely on his  
judgment as sufficient authority for the view I have expressed, particu-  
larly as the decision of the House of Lords was to the effect that, even  
after the Catchment Board had embarked upon the repairs, there was  
no duty to continue or complete the work.

For these reasons, I am respectfully of opinion that the judgment  
cannot be supported on the grounds adopted by the learned Judge.  
It remains to consider Mr. Relling's submission that, as the statute makes  
no direct provision for the repair of a private drain by the property owner,  
and as the Borough Council has wide general powers in respect of drainage  
and is in no difficulty with regard to interference with the streets in the  
exercise of those powers, there ought to be implied a statutory duty  
on its part to effect any repairs to private drains in the street that are  
necessary in order to avoid a nuisance. It is advisable to emphasize  
that the argument rests, not on any specific power to repair private  
drains—for there is none—but on (a) the absence of any express duty  
or power imposed or conferred on the owner, and (b) the general powers  
of the Borough Council in respect of drainage. I have already outlined  
those powers.

In this connection, Mr. Relling relied on *Chapman v. Fyffe Water-  
works Co.* ([1894] 2 Q.B. 599). But, in my opinion, that case is, to say  
the least, a very special case. There was an express statutory power  
of repair vested in the waterworks company, and the property owner  
was regarded as having no such power except with its consent. The  
pipe in question had been installed by the company, though at the owner's  
expense; the company was not invested with the ownership or control  
of the street; and the pipe served the joint interests of the company  
and the householder (*ibid.*, 605, per Lord Esher, M.R.). In his judgment  
in *Batt v. Metropolitan Water Board* ([1911] 2 K.B. 965, 975), *Fletcher  
Moulton*, L.J., preferred not to discuss the reasoning of the decision; 55

and its soundness is doubted in *Robinson on Public Authorities and Legal Liability*, 1925 Ed., p. 185. It seems almost to proceed on the principle—to quote the words of *Kay, L.J.*, that “somebody must be liable for “negligence in not repairing the apparatus”: *Chapman v. Flyde Water-works Co.* ([1894] 2 Q.B. 599, 607). But I need express no opinion about it, as I think there is no sufficient analogy between our statute and the one there in question. The case of *Julius v. Lord Bishop of Oxford* (1880) 5 App. Cas. 214 shows that there is an onus resting on anyone who suggests that a duty is to be inferred where the language of a statute purports to give a mere discretionary power. The onus must be far heavier where there is not even a permissive power expressly given on which to found the alleged duty. In my opinion, in such a case it must appear, on considerations similar to those discussed in the case just cited, that the Legislature must necessarily have intended to impose the duty. I do not see any sufficient grounds for drawing that inference here.

The Legislature has dealt with the matter in s. 229 by giving a Borough Council a discretionary power to require the owner to repair. It is accordingly on him that the duty is intended to fall; and to hold that there is an implied positive duty on the Borough Council to effect such repairs itself would involve it in possible liability for breach of that duty on every occasion when it resorted to the procedure authorized by s. 229, in so far as such procedure might involve delay in effecting the repairs. Whether it is permissible to imply a duty on the part of the owner in the absence of a requisition under s. 229 is a question that does not arise, but I am satisfied that the statute imposes no such positive duty on the Borough Council.

Even if, as counsel suggested, the property owner could not repair the drain without the appellant's consent, it would not follow that the duty to repair rests on the appellant. The appellant would still have the option under s. 229 of requiring the owner to repair, and there is no necessary implication that it must itself effect the repairs.

To sum the matter up, there was here, in regard to the repair of the footpath as such, no more than non-feasance on the appellant's part, and it was under no legal duty as a drainage authority either to repair the drain itself or to require the owner to repair it. There is, no doubt, a duty of a non-legal kind incumbent on a Borough Council to exercise its powers for the benefit of the community (as to which see *Municipal Council of Sydney v. Bourke* ([1895] A.C. 433, 439); but such a duty is not to be confused with legally enforceable duties. There was no breach of any legal duty, and the jury's findings that the footpath was a source of danger to pedestrians, and that the appellant was to some degree negligent in not discovering and remedying the defect, are irrelevant in the circumstances. The nuisance was not created by the appellant, and the appellant was guilty of no breach of duty such as would render it liable either for the continuance of the nuisance or, if negligence be relevant as distinguished from nuisance, for negligence. It seems that liability for nuisance may in some cases arise for mere non-feasance (*Pride of Derby and Derbyshire Angling Association v. British Celanese, Ltd.* ([1953] 1 All E.R. 179, 194, 195, 202); but this can apply only where the non-feasance is in breach of some positive duty.

It follows that, in my opinion, the appeal must succeed. The respondent's cross-appeal on the question of contributory negligence becomes accordingly irrelevant and must be formally dismissed.

There must also be an order for payment by the respondent to the

appellant of its costs of the appeal as on a claim for £359 12s., but, in the circumstances, there will be no allowance for the second day. The order of the Supreme Court as to costs must be reversed, and the appellant is entitled to its costs in that Court as per scale by reference to the amount claimed in the statement of claim (£875 9s. 8d.), with disbursements for fees of Court, witnesses' expenses and other necessary payments to be fixed by the Registrar of that Court. There will be no order as to costs on the cross-appeal. 5

*Appeal allowed : Cross appeal dismissed.*

Solicitors for the appellant : *Chapman, Tripp, and Co.* (Wellington).

Solicitors for the respondent : *Hogg, Gillespie, Carter, and Oakley* (Wellington).

### NAPIER HARBOUR BOARD *v.* PUBLIC TRUSTEE.

SUPREME COURT. Napier. 1953. December 16. 1954. January 27.  
ARCHER, J.

*Public Works—Compensation—Harbour Board's Endowment Lands—Part thereof taken for Public Purposes under Public Works Act, 1928—Compensation Moneys paid to Public Trustee—Order on Terms for Payment to Harbour Board—Public Works Act, 1928, ss. 91, 92 (1) (a), (3), (4).*

Seven sums of money, amounting in all to £15,170 15s. 9d. were paid from time to time during the years 1938 and 1951 to the Public Trustee as compensation moneys under the Public Works Act, 1928, for the taking for public purposes of parts of the Napier Harbour Board's endowment lands.

The Harbour Board sought an order under s. 92 of the Public Works Act, 1928 (as amended by s. 10 of the Public Works Amendment Act, 1952), directing payment of the moneys by the Public Trustee to the Board to be held by it in accordance with the terms of s. 92 (4) (as added by s. 10 (3) of the Public Works Amendment Act, 1952).

*Held*, That, having regard to the provisions of ss. 91 and 92 (as amended) of the Public Works Act, 1928, the moneys in the hands of the Public Trustee, with interest thereon and subject to the deduction of administrative expenses, should be paid to the Harbour Board under an order of the Court made under s. 92 (1) (a), but upon condition that the Board should hold and apply such moneys in the manner as is required of a local authority by s. 92 (4) in the case of moneys paid direct to that authority under s. 92 (3).

*In re Auckland Grammar School Board* ((1940) 4 N.Z.L.G.R.; 43) applied.

PETITION under s. 92 of the Public Works Act, 1928. This was a petition by the Napier Harbour Board and concerned seven sums of money, amounting in all to £15,170 15s. 9d., which had been paid from time to time to the Public Trustee as compensation moneys for the taking of parts of the Board's endowment lands for public purposes under the Public Works Act, 1928. The first of these sums was paid in the year 1938 and the last in the year 1951, and His Honour was not aware that any claim had been made previously by the Board for possession thereof. 5

The Board now sought an order under s. 92 of the Public Works Act, 1928 (as amended by s. 10 of the Public Works Amendment Act, 1952) directing payment of these moneys to the Board, to be held by

the Board in accordance with the terms of subs. 4 of s. 92, being a subsection added by virtue of the Public Works Amendment Act, 1952.

*McLeod*, for the petitioner.

*Wacher*, for the respondent.

*Cur. adv. vult.*

ARCHER, J. The Public Trustee submits to the order of the Court, but questions the authority of the Court to make the order applied for. In the course of his argument, counsel for the Board was prepared to rely upon s. 91 of the Public Works Act, 1928, as well as upon s. 92 of the Act, and he asked leave, if necessary, to amend the petition to include an application for an order under s. 91. For the reasons later to be given, I do not find this amendment to be necessary.

It is conceded by the Board that the lands for which the compensation moneys were paid were held by the Board upon the trusts and with the powers and for the purposes expressed in the Napier Harbour Act, 1875, that the Board had only a partial or qualified interest in the lands and was not entitled to sell or convey them, and that accordingly the provisions of s. 92 of the Public Works Act, 1928, are, or were, applicable to the compensation moneys. The Board desires payment of the moneys in order that it may use them for the permanent improvement of its other endowment lands, and, in particular, of the land adjoining the Napier Breakwater Harbour. The Board concedes that these purposes are not authorized by s. 92 (1) (a) of the Public Works Act, 1928, but claims that they would be authorized by the recently added subs. 4 of s. 92, if that subsection be applicable to this case.

The only directly relevant authority referred to me is *In re Auckland Grammar School Board* ((1940) 4 N.Z.L.G.R. 43) which was decided before the amendment of s. 92. In this case, orders for payment of compensation moneys were sought by the Auckland Grammar School Board and by the Auckland City Council. It was held that (as the law then stood) where land was vested in a person (including a corporation) who had no power to sell and who, therefore, could not give a valid receipt for the purchase money to a purchaser of the land, there was a doubt as to the right of such person to receive compensation moneys payable in respect to such land, and such compensation moneys should, therefore, be paid to the Public Trustee under s. 91. It was also held that the interest of such a person in the land (*i.e.*, of a person holding land but without power to sell) was a "qualified interest", and that s. 92, therefore, applied in respect of compensation moneys paid for land taken from him.

The headnote proceeds :

In the case of the two petitions to the Court under s. 92, the Court held, on the facts, that there was a "doubt" under s. 91 ; that each claimant had a "qualified interest" in the land taken ; and that s. 92 applied. Orders were made that the compensation should be paid to each petitioner in such a way as to preserve the trust on which it had held the land taken in as nearly the same form as if the endowment had continued in land.

The relevant subsections added to s. 92 by the Public Works Amendment Act, 1952, were as follows :

(3) Notwithstanding the provisions of subsection one of this section, where the person having the partial or qualified interest in the land and not entitled to sell or convey it is a local authority the compensation money or purchase money may be paid to the local authority.

(4) The local authority shall record any moneys paid to it under subsection three of this section in a separate account and shall invest them separately; and shall expend them only for the permanent improvement of other lands held for the same or like uses, trusts, and purposes or for all or any of the purposes set out in subparagraphs (i) and (ii) of paragraph (a) of that subsection, and so that the application of the money as aforesaid will benefit persons in substantially the same locality.

It is clear that, if the lands concerned in the present case had been taken subsequent to this amendment, the compensation moneys could properly have been paid under subs. 3 direct to the Board, subject to the provisions of subs. 4. The Public Trustee questions, however, whether the amendment can be given retrospective effect, and points out that, in any case, its terms seem hardly appropriately worded to cover the case of moneys already in the hands of the Public Trustee.

I do not think it necessary to go into these questions, however, as I am of opinion that I may properly give effect to the wishes of the petitioner upon the authority of *In re Auckland Grammar School Board* ( (1940) 4 N.Z.L.G.R. 43). In that case, it was held that both s. 91 and s. 92 were applicable to the moneys there under consideration. The Court, moreover, made orders which were in rather wider terms than would at first sight appear to have been warranted by s. 92 (1) (a). In terms, that subsection appears to authorize the payment of compensation moneys direct to a claimant only where the claimant can show that he has become "absolutely entitled thereto", but it was held that the Auckland Grammar School Board was not "absolutely entitled" within the meaning of s. 92 (1) (a) (v). On this point, the Court said: "Mr. Richmond suggested I should make a payment to the Board as the person 'absolutely entitled'. In one sense it is entitled to the absolute ownership. But, in my view, it is not 'entitled to claim a payment without conditions' (*ibid.*, 52). (The italics are mine). The Court then made an order for the Public Trustee to pay the compensation moneys to the Board upon conditions designed to preserve the fiduciary character of the Board's qualified interest therein.

I consider that I am similarly entitled in this case to make an order for the payment of the compensation moneys to the Napier Harbour Board upon conditions in keeping with the statutory obligations of the Board in relation to its endowments. I am entitled, moreover, to have regard to the whole of s. 92 as it now stands, and, in particular, to subs. 4 of s. 92, which, in effect, extends the powers of local authorities, including Harbour Boards, in respect of moneys received as compensation for the taking of lands in which the authority concerned had no more than a qualified interest. It is conceded that no person other than the Napier Harbour Board has any right to these moneys, and that the Public Trustee is concerned only to urge that they be applied according to law. Having regard to the provisions of s. 91 and of s. 92, as now amended, of the Public Works Act, 1928, which should, I think, be given a liberal interpretation, I am of opinion that it will be in accordance with the intention of the Legislature if these moneys, together with the interest thereon, and subject to the deduction of administration expenses, be now paid to the Napier Harbour Board under an order of this Court made under s. 92 (1) (a), but upon condition that the Board shall hold and apply such moneys in the same manner as is required of a local authority by subs. 4 of s. 92 in the case of moneys paid direct to that authority under subs. 3 of that section.



An order will be made accordingly, and the parties are requested to submit a draft form of order to the Court. £10 10s. costs and disbursements will be allowed to the Public Trustee.

*Order accordingly.*

Solicitors for the petitioner: *Sainsbury, Logan, and Williams* (Napier).

Solicitors for the respondent: *Lawry, Dowling, and Wacher* (Napier).

### CITY IMPROVEMENTS, LIMITED, v. LOWER HUTT CITY CORPORATION.

SUPREME COURT. Wellington. 1953. June 23; July 29. FAIR, J.  
COURT OF APPEAL. Wellington. 1953. September 22; December 18.  
GRESSON, J.; STANTON, J.; NORTH, J.

*Town-planning—Approval of Building-plans Subject to Condition—Building within Area zoned for Residential Purposes—Town-planning Scheme prohibiting Erection of Licensed Hotels on Residential Sites—Refusal of Application for Permit to alter Building to make it suitable for Licensed Hotel—Further Application for Permit for Amended Plans for Alterations to make Buildings suitable for Private Hotel—Possibility of Licence being granted in respect of Premises—Alterations approved subject to Undertaking being given by Owner that Building would not be converted from Private Hotel to Licensed Hotel—Condition within Local Authority's Powers as Town-planning Authority—Power conferred on Local Authority referable to Structure of Proposed Buildings and to Use proposed to be made of Them—Town-planning Act, 1926, s. 23 (1).*

The power given to a local authority by s. 34 (1) of the Town-planning Act, 1926, to impose conditions on the granting of its consent to the erection of any buildings within its district, applies both to the physical structure of the proposed buildings and to the use proposed to be made of the premises.

Accordingly, a local authority, in granting its consent to alterations in building, may, in exercising that power, impose a condition or conditions which relate to its future user.

*So held* by the Court of Appeal, dismissing an appeal from the judgment of Fair, J., (post., p. 339).

The appellant applied in December, 1950, for a permit under the respondent's building by-laws to alter certain buildings in the Lower Hutt borough to make them suitable for a licensed hotel. The respondent refused the application under s. 34 of the Town-planning Act, 1926, upon the grounds that, in its town-planning scheme, the site had been zoned for residential purposes, and that under the scheme the erection of licensed hotels in the residential area was prohibited. Requests were made to induce the respondent to reconsider its decision, but it refused to do so. An appeal to the Town-planning Board was dismissed. In April, 1952, a further application was made by the appellant for a permit to make alterations to its buildings, in accordance with plans and specifications then submitted, to render the building suitable for a private hotel (which would not have been in contravention of the respondent's town-planning scheme). The applications made in December, 1950, for a permit to convert the premises for use as a licensed hotel had been supported by plans showing the proposed alterations in which plans an area of approximately 1300 sq. ft. was shown set aside as bar-room space. The plans supporting the application to convert the premises for use as a private hotel showed portions of the proposed building totalling an area of 1,300 sq. ft. set aside as recreation space. The portion so set aside as recreation space appeared identical with the portion set aside for bar space in the plans earlier submitted.



The plans were not in conformity with the respondent's town-planning regulations relating to general residential zones, in that there was a failure to conform with the Borough's town-planning scheme's "front yard" regulation, requiring that no person should erect, construct, add to, re-erect or re-construct any building so that any part thereof should be within 15 ft. of the street boundary; but the respondent was willing to dispense with that requirement. The decision of the respondent in respect of the last application, as contained in a resolution of the respondent's Council passed on December 8, 1952, was in the following terms;

"That this application be approved and the necessary dispensation granted subject to the following conditions being acceptable to the company:—

- (a) The bedrooms to be provided in the permanent building instead of in the old wooden building as proposed by the application; the alterations to be constructed in permanent materials.
- (b) That in view of the past negotiations and decisions with regard to the use of this building an undertaking be given to the Council that the company does not propose to convert this building from a private hotel to a licensed hotel.

The appellant did not appeal from that decision to the Town-planning Board.

It was not disputed that the defendant corporation was influenced by the knowledge that, on May 11, 1951, application had been made to the Hutt Licensing Committee under s. 19 (3) of the Public Works Amendment Act, 1948, for the removal of the licence attaching to the Hotel Cecil in Wellington to premises to be erected on the site of the appellant's buildings; that, on June 17, 1951, the application had been considered by the Licensing Committee which had decided that the Wellington Licensing Committee be recommended to grant such removal; that on May 14, 1951, an application had been filed by one McP. for a publican's licence in substitution for the former Hotel Cecil licence to be issued for premises intended to be erected on that site; and that McP. was a director of, and a substantial shareholder in, the appellant company. The application relating to the removal of the licence had not yet been determined by the Licensing Committee.

After due notice, the appellant, on February 18, 1953, began an action seeking a mandamus commanding the defendant corporation to issue the permit for which the plaintiff had applied. *Fair, J.*, dismissed the action. The appellant appealed.

*Held, per totum curiam*, That when the respondent, in exercise of its powers under s. 34 of the Town-planning Act, 1926, conditionally refused its consent to the carrying out of the proposed work by the appellant, the condition attached to the refusal was one which the respondent could validly impose under the section.

*Per Gresson, J.*, 1. That there is nothing in s. 34 to limit or qualify in any way the generality of the power thereby given to a local authority.

2. That, in the light of the history of the appellant's repeated attempts to obtain approval of the use of the premises for the conduct of a licensed hotel and the preservation of the space originally intended for the bar, the condition imposed by the respondent was reasonable; and, indeed, might be regarded as necessary to preserve the integrity of the respondent's town-planning scheme.

*Per North, J.*, 1. That s. 34 does not authorize a local authority to require an applicant for a permit to bind himself indefinitely as to the future use to be made of the new buildings or works, the plans of which have been submitted to the local authority for its approval under the Town-planning Act, 1926; but the respondent's condition (b) was not a demand for an undertaking that the premises would never be used as a licensed hotel.

2. That a local authority has power under s. 34 to require the applicant to state the use to which it proposes to put the premises; and that, if it is dissatisfied with the answer or has otherwise been put on the alert, it is entitled to call on the applicant for an assurance as to its intentions.

3. That the respondent desired an undertaking from the appellant that its application was being made in good faith; and the respondent, in all the circumstances, was entitled to withhold its consent when such an undertaking was refused.

Appeal from the judgment of *Fair, J.*, (*post.*, p. 339) dismissed.

APPLICATION for a writ of mandamus ordering the defendants to issue to the plaintiff a permit to carry out alterations to a brick and concrete building situate within the city of Lower Hutt.

The facts are fully set out in the judgment.

- 5 *D. Perry*, for the plaintiff.  
*Oakley and Curtin*, for the defendant

*Cur. adv. vult.*

10 FAIR, J. This application involves an interpretation of s. 34 of the Town-planning Act, 1926, but the facts, none of which appears seriously in dispute, require to be set out in some detail before the question of law is considered.

15 The plaintiff company is the owner of land at the corner of Cuba Street and Central Terrace in the city of Lower Hutt, upon which is erected a two-storey brick and concrete building used for commercial purposes, and an old dwelling-house adjoining. In the month of December, 1950, the plaintiff applied to the defendant for a permit to alter these buildings to make them suitable for a licensed hotel, but his application was refused on March 12, 1951, under s. 34 of the Town-planning Act, 1926, on the ground that in the city's Town-planning scheme the building was within an area zoned for residential purposes, and the scheme prohibited the erection of licensed hotels on residential sites.

20 On March 20, 1951, the plaintiff requested the Council to reconsider its decision, but, on April 9, it declined to do so. Further representations were made to it, but, on July 9, 1951, it refused to alter its decision. On July 16, the plaintiff gave notice of its intention to appeal to the Town-planning Board against the Council's decision, and such appeal was considered by the Board on November 27, 1951.

25 On November 30, 1951, the defendant was advised that the Board had considered the appeal, and dismissed it on the grounds "that the Board considers that the area which includes the property on which the appellant Company wishes to establish a hotel has been rightly classified by the respondent Council in its proposed Town-planning scheme as a general residential district."

30 On April 16, 1952, a further request for a permit to convert such premises into a licensed hotel was refused by the Council, and that decision was reaffirmed by the Council on June 9, after hearing a deputation on behalf of the plaintiff.

35 On October 21, the plaintiff applied for a permit to make alterations to the buildings in accordance with the plans and specifications then submitted to the defendant corporation with the intention of rendering the buildings suitable for a private hotel, and an amended plan was forwarded to the Council on December 4, 1952. On each of the plans, portions of the buildings totalling approximately 1,300 sq. ft., were set aside as recreation space. Such portions appeared identical with the portions set aside in the plan under the previous application for bar-room space.

40 It requires further to be recorded that on May 11, 1951, application was made to the Hutt Licensing Committee (which controls licensed hotels within Lower Hutt City) under s. 19 (3) of the Public Works Amendment Act, 1948, for the removal of the licence from the Hotel Cecil in Wellington to premises to be erected on the corner of Cuba Street and Central Terrace in the city of Lower Hutt. Such application was considered by the Hutt Licensing Committee on June 7, 1951. The

decision of the Licensing Committee was that the Wellington Licensing Committee be recommended to grant a removal of the licence to such site when the building was completed in accordance with a plan approved by the Licensing Committee. On May 14, 1951, an application was filed by Charles John McParland for a publican's licence in respect of the Hotel Cecil licence for premises to be located on the corner of Cuba Street and Central Terrace. Mr. McParland has been, and still is, a director of the plaintiff company and has held, and still holds, 7,500 shares of £1 each in that company, the capital of which is £30,000 divided into 30,000 shares of £1 each. He is described on the Share Register as a hotel-keeper. 5 10

It is admitted by the plaintiff that, if a suitable building is available, the Minister of Works and the Licensing Committee may grant a licence in respect of premises without requiring the consent or approval of the Lower Hutt City Council. 15

On December 8, 1952, the Council of the defendant adopted a resolution relating to the plaintiff's application of October 21, in the following terms :

That this application be approved and the necessary dispensation (as to "front yard" or "air space" requirements for a private hotel) granted subject to the following conditions being acceptable to the company :— 20

(a) (Is irrelevant to the present matter).

(b) That in view of the past negotiations and decisions with regard to the use of this building an undertaking be given to the Council that the company does not propose to convert this building from a private hotel to a licensed hotel. 25

The plaintiffs, upon being advised of this, accepted the first condition, but advised that the second one was not acceptable, and asked that a permit be made available as early as possible.

On December 24, 1952, the Council repeated its requirement that the permit should be subject to the second condition as well as the first. On January 30, the plaintiff's solicitors gave notice of their intention to apply for a mandamus requiring the corporation to issue such permit on the grounds : 30

1. That it is entitled to make its proposed alterations to its premises, subject only to compliance with the provisions of your corporation's by-laws and the general law ; 35

2. That it is entitled as of right to the issue of the permit applied for ;

3. That your Council has refused to grant the said permit except upon the condition that the said company shall give an undertaking as to the future user of the premises ; 40

4. That your Council or Corporation has no right, power or discretion to require as a condition of the issue of the said permit that the company shall give such undertaking.

These proceedings were commenced in this Court on February 19, 45 1953, and the ground set out in the statement of claim was that the imposition of the condition by the defendant corporation is not authorized by the by-laws, or otherwise, and is beyond the powers of the defendant corporation.

At the hearing, Mr. Perry also submitted argument that the defendant in determining the matter had taken into consideration matters which it should not have had regard to and, in particular, in its earlier consideration of the previous applications had heard a deputation from nearby householders as to their objections to a permit being granted. It was suggested, as they were heard in the absence of the plaintiff, 55

that that should invalidate the decision of the Council. I cannot attach weight to this argument for the Council is entitled to hear representations made on behalf of the residents whom it represents, and it seems too late for the plaintiff to raise this question as to matters dealt with by the Council before the appeal to the Town-planning Board, and in respect of matters which were subject to review by that Board. The plaintiff does not appear to have made any previous complaint as to these, or to have asked that it be present when a deputation was being heard. It is not a ground set out in the statement of claim and, in the circumstances, I would not be prepared to amend the statement of claim to include this ground which appears, on the scanty evidence as to the circumstances, somewhat technical: and, moreover, in respect of which the defendant may be entitled to urge that the plaintiff is estopped from now raising it by its previous inaction in respect of it. Then, if there were any grounds for complaint on this basis, before any amendment would be granted they would require to be based on much more detailed and substantial evidence than has been put before the Court here.

There was also in the plaintiff's affidavits material suggesting, rather than alleging, bad faith, or inconsistency in the Council's attitude in that it was prepared in another instance to allow premises to be taken out of a residential zone for use for the erection of a licensed hotel. This aspect did not appear to be relied on to any material extent in the plaintiff's argument. The affidavits in reply clearly showed that the circumstances and situation of the premises concerned were very different in those cases, and I do not think it is necessary for me to refer to it in detail.

It appears to me that the question that the Court has to consider is wholly one of law, and depends on the construction of s. 34 of the Town-planning Act, 1926. This, so far as relevant, reads as follows:—

(1) Any local authority that by this Act or by Order in Council under this Act is under an obligation to prepare a town-planning scheme . . . may at any time before the scheme has been approved by the Town-planning Board absolutely or conditionally refuse its consent to the erection of any building or the carrying-out of any work within its district, or may definitely prohibit the erection of such building or the carrying-out of such work, if it appears to such local authority that the erection of such building or the carrying-out of such work would be in contravention of the scheme if it had been completed and approved, or would be in contravention of town-planning principles, or would interfere with the amenities of the neighbourhood.

(2) Any person injuriously affected by any determination of a local authority under this section may appeal from that determination to the Town-planning Board.

(3) The determination of the Town-planning Board for the purposes of this section on any question relating to principles of town-planning shall be conclusive and shall bind the local authority.

There have been numerous decisions on this section, and it is now well established that the powers given by it may be exercised:—

(1) Even though no town-planning scheme has been considered by the local body: *Wong v. Northcote Borough* (*ante.*, p. 132).

(2) Where a scheme has been provisionally approved by the local authority, as is the case here, although it has not been approved by the Town-planning Board (*ibid.*); and *Mount Eden Borough v. New Zealand Wallboards, Ltd.* ([1945] 5 N.Z.L.G.R. 326).

The sole question that arises in the present case is as to the scope and application of the words "if it appears to such local authority that . . .

"the carrying-out of" (any work within its district) "would be in contravention of the scheme if it had been completed and approved, or would be in contravention of town-planning principles, or would interfere with the amenities of the neighbourhood". The question seems to be whether the words extend to work which would not immediately have that effect, but which appears to the local body to be intended and designed for use in the immediate future for a purpose in contravention of the scheme, or town-planning principles, or the amenities of the neighbourhood. 5

It appears clear from the facts set out above that the Council had the strongest grounds for believing that the alterations, as planned, were intended to make the building suitable for a licensed hotel rather than a private hotel. It is true that it would be also suitable for the latter purpose, although the unusual extent of its indoor recreation space and the original design plainly indicated its suitability for a licensed hotel bar. 15

The Council had before it, too, the fact that, if the building were altered in the way suggested, a licence might well be, and probably would be, obtained by the plaintiff or its representative from the Licensing Committee over which the Council has no control.

In such circumstances, it does not appear unreasonable of the defendant to impose a condition to prevent its town-planning scheme from being defeated owing to the powers of the Licensing Committee. It may be that it had power absolutely to refuse to sanction the alterations if it appeared to it that their real purpose was to enable the plaintiff to avoid the control over the use of the building given to the Council, and to nullify its refusal to allow it to be used as a licensed hotel. But such a refusal might have been open to objection on the ground that it was harsh and unreasonable as the same end might have been obtained by imposing a condition. But the power to impose a reasonable condition seems the natural and desirable complement of, or alternative to, a power of absolute refusal. In this case, the condition sought to be imposed seems to me, in the circumstances, to be entirely reasonable except, perhaps, as to its term. It seems, indeed, the only way in which the Council could effectively ensure that its powers and duty to enforce observance of its town-planning scheme were effective. 35

This consideration raises a strong *prima facie* presumption that such powers are included in the words of the section. To grant a permit without conditions would, it appears, almost certainly result in its being used for a purpose in contravention of the town-planning principles which had been approved not only by the Council but the Town-planning Board. It could be considered, too, as ultimately in conjunction with a licence interfering with the amenities of the neighbourhood. To limit the Council to considering only the immediate effect of its decision : and oblige it to ignore almost certain consequences at a not distant date would, I think, place an unreasonably strict construction on the language, and seems inadmissible. That it should not be strictly construed appears to be confirmed by the authorities to which I have been referred, as well as by the very helpful decision of *Callan, J.*, in *Fenton v. Auckland City Corporation and Dominion Motors, Ltd.* (1945) 5 N.Z.L.G.R. 353). His Honour there explains his reasons for being obliged to give an oral decision, but his language is clear and, with respect, seems to me a sound exposition of the wide powers conferred by s. 34 and the manner in which they should be exercised. He says : "In my opinion, s. 34 empowers the local body to make, from time to time and in succession, a number of independent decisions as to matters which, if allowed, 55

- "would conflict with the scheme as it last was. In my opinion, the local body is empowered by Parliament to decide each of these as it comes up, and to decide each of them in one or other of three ways. As to each, it may say, in the exercise of its judgment,—‘No, this thing
- 5 “which is proposed would make nonsense of our town-planning scheme ‘as it was when we last saw it, and as we hope it will be to the end, and we will have none of it’, and totally refuse. Or it may say,—‘This particular proposal does undoubtedly offend, but touches an aspect of the scheme which we do not regard as of tremen-
- 10 “dous importance, and we would not be at all surprised or disappointed ‘if it were changed by the Board in Wellington, or by the later re-consideration; and, really, balancing interests and what is just to all parties, we think it right, now that we have learned that somebody
- 15 “wants to do this, to let the whole of it be done, though it offends against our town-planning scheme.’ Or it may say,—‘Well, this is against our town-planning scheme; but, for various reasons that seem to us good, to some extent in this particular instance, that scheme may be varied, and we will allow something which, to some extent, offends against it, but we will not allow all the length that
- 20 “these people wish to go to. Weighing what is our idea of justice and what is good for the city and its various citizens, we think it is a case of “thus far” in transgression of the provisional town-planning scheme, but “no further”. In my belief, all those powers are given, and it therefore follows that in order to succeed in this motion,
- 25 “it must be established, upon material made available to the Court, that the city has acted improperly, with bad faith, or influenced by considerations which the law forbids it to be influenced by” (*ibid.*, 358). Later on, he says: “But for the city to realize that to Dominion Motors, Ltd.” (to whom in the year before the Town-planning
- 30 Scheme having been adopted the city had issued a building permit) “in all the circumstances, there was something in the nature of a moral duty, would be very natural. Something fell from Mr. Mackay which rather suggested that he also argues that City Corporations and their officials have no right to afford themselves the luxury of considering
- 35 “mere questions of commercial morality, apart from legal rights. That cannot be so, and I cannot subscribe to that. . . . But in a matter of this sort, where the plain function of the city is to do what is fair to everybody as best it can, and what is best for the city, to observe the ordinary decency of avoiding getting into the situation that it has
- 40 “encouraged people to start expensive building in the belief that they will be allowed to finish, and then to break faith—to avoid that kind of thing, in my opinion, is part of the duty of those charged with the administration of this matter. And, if it be a fact (it looks as if it were a fact) that in deciding to be influenced by this, and to do what was
- 45 “decent in the matter, the City authorities were influenced also by a realization that it would be expensive to act otherwise, does not seem to have an adverse effect on the validity of the decision. One is glad to learn that the two motives combined to lead in what, I venture to think, was the right direction” (*ibid.*, 359).
- 50 More directly applicable to the circumstances of the case is a decision of *Hutchison, J.*, in *Attorney-General v. Prince* (*ante*, p. 210). In that case, the defendant had erected a building in respect of which he had no permit, and which contravened the City of Palmerston North’s town-planning scheme. The Council sought an injunction restraining
- 55 the defendant from using the building, or permitting it to be used, for

any purpose other than permitted uses in residential or local commercial districts as such permitted uses are restricted in the Standard Code of Clauses for town-planning schemes. There, the Court held that the proper way of enforcing the Council's powers was to grant an injunction restricting the use of the building in the terms asked for. That seems a close parallel to the present case indicating the necessity for the existence of a power to impose a condition such as that here being considered. That is confirmed by the general considerations to which I have referred. The same general broad view seems contemplated by s. 15 and cl. 7 of the Schedule to the Town-planning Act, 1926, and by the decision in *Downs and Poole, Ltd. v. Upper Hutt Borough Council* ([1950] G.L.R. 240, 244). That decision holds, too, that *Quinlan v. Mayor &c. of Wellington* ([1929] N.Z.L.R. 491; [1929] G.L.R. 152) relied on by the plaintiff did not apply to s. 34 where a refusal was absolute. The general considerations there adverted to, in my opinion, apply with full force to this case. The town-planning authority has a very wide discretion which is generally invalid only where it issued either *mala fide*, or for purposes other than those for which it is given. Here, it had ample grounds for thinking that an unconditional approval of the plans would result in an interference with the amenities of the neighbourhood and would in fact, though not in form, be, in view of the special circumstances, in contravention of town-planning principles, and so should be approved only conditionally.

There remains only the question as to whether the condition is unreasonable as fixing no time within which the condition is to operate. That does not appear to me to make it unreasonable. Indeed, it seems necessary, as appears to have been the position with the injunction in *Prince's case* (*ante*, p. 210), that it should be indefinite in time. It will operate until the City Council, in the exercise of its powers under the Town-planning Act, may decide to release it. It seems probable that there would be no difficulty in effecting that if, as controlling authority, it decided that it was, at some stage in the city's development, desirable.

For these reasons, I think the Council has power to impose this condition, and that the application must be dismissed, with costs to the City Council £78 15s.

From the whole of the foregoing judgment, the plaintiff appealed on the grounds that it was erroneous in fact and in law.

In the Court of Appeal,

*Cleary and D. Perry*, for the appellant.

*J. H. Oakley and Curtin*, for the respondent.

*Cleary*, for the appellant. The appellant is the owner of a property which was erected, and always has been used, as a commercial building, but it is in a locality which, under the respondent's town-plan zoning scheme, is classified as "general residential." In October, 1952, the appellant made application to the respondent for the purpose of converting the premises into a private hotel. The carrying-on of a private hotel is what, in the language of the town-planners, is known as a permitted use in a residential area. This is the application the Court is concerned with in the present case.

The respondent has attached to its decision to grant the permit a condition that the appellant give an undertaking as to the future use of the premises, which the appellant was not prepared to give.



[To NORTH, J. Any condition that may properly be imposed on the granting of a dispensation must be a condition affecting that which is dispensed with and not something else that has no bearing upon it whatever.]

5 The question at issue is whether the local authority has power under s. 34 of the Town-planning Act, 1926, to exact from an applicant for a building permit an undertaking as to the future use to be made of the building.

A. There is no such power, apart from s. 34; and, that being the position, the normal situation is that spoken of in *Quinlan v. Mayor, &c., of Wellington* ([1929] N.Z.L.R. 491, 495, 496; [1929] G.L.R. 152, 154, 155).

B. Where a scheme has been finally approved by the Town-planning Board, there are statutory provisions enabling a local authority to control the use of buildings in conformity with the scheme: see s. 76 of the Statutes Amendment Act, 1941, and s. 6 of the Town-planning Amendment Act, 1948. The whole complaint in this case really is that, by seeking to obtain the undertaking from the appellant, the respondent, although it never has had its scheme approved and operates only under s. 34, seeks to control the future use of a building and so to put itself in the same position as if it had had its scheme approved.

C. Under s. 34, the powers of the local authority are confined to the refusal of its consent to the erection of any building or the carrying-out of any work. Such refusal is to be exercised upon the grounds set out in the section; and its powers do not extend to the control of the future use of any building. Those powers of control have been reserved by the Legislature to those local authorities which have had their scheme finally approved by the Town-planning Board.

All that s. 34 of the Town-planning Act, 1926, enables the local authority to prohibit is the erection of a building or the carrying-out of any work; and that refusal must be based upon one of the three grounds set out in the section. It is at least questionable whether a local authority which has adopted a scheme may rely on the second or third grounds at all. It must appear to the local authority that the erection of the building or the carrying-out of the work would contravene one or more of the grounds available to the local authority under s. 34. Undoubtedly, the local authority may have regard to the kind or nature of the building or work, in deciding whether or not to give its consent. The common case where local authorities have refused their consent under s. 34 is where extensions are sought to existing buildings which already do not conform to the zoning requirements: *Mt. Eden Borough v. New Zealand Wallboards, Ltd.* ([1945] 5 N.Z.L.G.R. 326; G.L.R. 361); *Downs and Poole, Ltd. v. Upper Hutt Borough Council* ([1950] G.L.R. 240) and *Wells v. Newmarket Borough* ([1932] N.Z.L.R. 50, 57; [1931] G.L.R. 590, 591). But, if an application is made to a local authority for permission, for instance, to erect a dwellinghouse in a residential zone, the local authority has no power to attach a condition that the dwellinghouse shall not in future be used as offices or as a club. The reasons why the respondent attached the condition are obvious. It had in mind the previous applications and negotiations for the use of these premises as a licensed hotel; and it had in mind the similarity in the plans lodged in support of both applications. Whatever the reasons of the respondent may have been, whether its hopes or fears that these premises may in the future become licensed premises were well grounded or not, it had no power under s. 34 to impose a con-



dition as to use. The application for the alteration of the building for use as a private hotel contravenes nothing that the respondent is concerned with; on the other hand, it conforms to the zoning requirements of the respondent's scheme, and that is all that the respondent can concern itself with under s. 34. The section, in terms, contemplates the local authority's laying down conditions. The conditions that it may impose are conditions relating to the building or nature of the work itself to which it consents: *Fenton v. Auckland City Corporation* ((1945) 5 N.Z.L.G.R. 353) and *Wong v. Northcote Borough* (*ante*, p. 132). The section does not authorize a "condition" as to the control of the use of a building in the future, whether near or remote, which power of control can be exercised only by a local authority which has had its scheme approved. 5 10

D. A local authority, which elects to operate under s. 34 and takes the advantages of so doing, must accept any disadvantages that ensue. 15 Once a plan is approved, it is the duty of the local authority to enforce it, and dispensations are entirely in the hands of the Town-planning Board: s. 22. Under s. 34, however, the powers of the local authority are permissive only; and they are flexible. The Council of the local authority may, under s. 34, grant dispensations; and it may presumably 20 from time to time alter its scheme.

[To NORTH, J.] Originally, s. 34 was enacted to enable local authorities to deal with matters pending the approval of the scheme. It is idle for the respondent to suggest that it has not elected to act under s. 34 rather than have its scheme approved, because that is patently 25 what it has done.]

What is submitted here has no effect on interpretation: but see *Wong v. Northcote Borough* (*ante*, 132, 138).

As to His Honour's judgment (*ante*, p. 338): it proceeds on two principles: (a) that the respondent could have refused this application, 30 and (b) that the imposition of a condition as to user was a natural complement to the power of refusal. Both those propositions are disputed. It is denied that the respondent could have refused this application (otherwise than by insisting on the fore-court); because it was an application to do work that conformed to its scheme. His Honour 35 seems to assume that there was a power of refusal in order to enable the respondent to control the use; but a local authority has no power of control over user. It is also denied that a power to impose a condition as to user is a natural complement to the power of refusal that is conferred by s. 34; and it is contended that, because the power of 40 refusal is limited to the refusal of the erection of a building or the carrying out of work, so also the conditions which may be attached to the granting of the consent, must be related thereto.

[To NORTH, J.] At no stage has it been suggested that the conditions as to user could be tied to the dispensation as to the fore-court.] 45

[To GRESSON, J.] The respondent is clearly entitled to take into consideration the kind of work it is authorized to approve. There is no question here as to the purpose of the application. The question is whether the respondent can ask the appellant to give an undertaking that it will not continue to use the premises as a private hotel. Mere 50 zoning as a residential area does not prohibit any property-owner in that area from using his building for other than residential purposes, unless he has to apply for a permit.

The way in which this application was dealt with by the respondent raises the issue as to whether it is competent for a local authority to require an undertaking as to the future user of a building. Had the matter been dealt with differently, and had it been said that this was a sham altogether, then the issue in the proceedings would have been different, the evidence no doubt would have been different, and different questions would have arisen : among others, the question of onus as to such an issue.

- As to the cases to which some importance was attached by the learned Judge : (a) *Fenton v. Auckland City Corporation* (1945) 5 N.Z.L.G.R. 353) does not assist on the question which, on the appellant's argument, arises here—namely, whether the respondent, in granting a permit under s. 34 for a building that conforms to its zoning requirements, may attach a condition as to future user. (b) In *Attorney-General v. Prince* (*ante.*, p. 210), the Court granted an injunction to restrain the defendant from a non-conforming user of his building ; and it cannot be construed as authority for the different proposition which arises here—namely, whether, under s. 34, the local authority itself can control the user of a building upon the grant of a permit under that section.

- Oakley*, for the respondent. It is agreed that the respondent must rely on s. 34 to uphold and sustain the condition it has sought to impose. The respondent was prepared, if the conditions were complied with, to grant an unqualified permit to carry out the alterations to the building ; it was not trying to grant a conditional permit or attach a condition to the permit ; but it rather regarded the undertaking it sought as being a step in a final inquiry preceding the issue of the permit.

- On the question whether the respondent was entitled to consider user as coming within s. 34, His Honour was correct in his findings from the facts before him. In particular, his findings of the facts relevant to the present proceedings were : (a) that the Council had the strongest grounds for believing that the alterations, as planned, were intended to make the building suitable for a licensed hotel rather than a private hotel ; (b) that the Council had before it, too, the fact that, if the building were altered in the way suggested, a licence might well be, and probably would be, obtained by the appellant or its representative from the Licensing Committee, over which the Council has no control ; (c) that the condition sought to be imposed is, in the circumstances, entirely reasonable, except, perhaps, as to its term, and that it seems, indeed, the only way in which the Council could effectively ensure that its powers and duty to enforce observance of its town-planning scheme were effective (*ante.*, p. 342). When those facts are considered, in the light of the additional factor that the respondent at no stage had before it any evidence from, or on behalf of, the appellant that it did not intend in any way to violate the principle of the scheme, this further fortifies the view expressed by the learned Judge.

- Section 34 must be considered in the light of those facts. The appellant submitted that s. 34 can be invoked only by the respondent where the work itself and by its nature offends against the scheme ; that here in its nature the work did not offend against the scheme ; and that, hence, under this section the respondent had no right to impose any conditions. That is not the proper way to read and interpret the section ; and the section really means, not only work which by its nature offends against the scheme, but also work which by its purpose or user offends against the scheme. The carrying-out of the work, and

the use to which the completed work is to be put, are so intermingled that one must consider both of them in properly considering the section. In short, the local authority, when it considered the question, had to consider in this case whether the carrying-out of this work, in its nature and purpose, contravened the scheme. This is required of it on a proper appreciation of the statute, and the particular language of s. 34. The whole purpose of the statute is to provide for more orderly and careful planning of boroughs and cities and for a consequent improvement of amenities. This statute should, therefore, be construed as specified in s. 5 (j) of the Acts Interpretation Act, 1924, to enable the object of the statute to be attained. This can be done here only by imposing, under s. 34, the condition which the respondent seeks to impose; because s. 34 is the only section dealing with provisional schemes. Section 15 gives to the Council the power to set aside certain areas to be used for certain purposes under its scheme. It seems, therefore, that under the scheme the Council has to decide the use to which certain structures are to be put.

There is no case which in any way really touches the matter dealt with here; but the cases relied upon by the learned Judge, *Attorney-General v. Prince* (*ante*, p. 210) and *Downs and Poole, Ltd. v. Upper Hutt Borough* ([1950] G.L.R. 240) throw some light on the question of user of premises. In *Prince's* case (*ante*, pp. 210, 214), it was not the building itself which in any way interfered with the amenities of the neighbourhood; and there is an irresistible inference that it was only the use to which the storeroom would be put that could have interfered with the amenities of the neighbourhood; and the nature of the remedy shows that the user was considered relevant.

[GREGSON, J. Does a limitation imposed by the Court on the user against a wrongdoer take this Court any further towards establishing that the Council might attach a condition of user *before* granting permission?]

The Court in that case said that the defendant must not use the store-room in a way which conflicted with the scheme. It is conceded that it is a different case. In *Downs and Poole, Ltd.'s* case ([1950] G.L.R. 240, 244), there was no suggestion that the building itself contravened the scheme or by-laws; but objection was taken to the user to which the building was to be put. Arising out of those cases, the respondent was entitled to hold that the stated purpose was not the real purpose; and it was entitled to consider that its scheme might be violated unless it had the undertaking as to user. Accordingly, until it had that evidence before it, it had every reason to believe that the stated purpose was not the real purpose; and, accordingly, it was entitled to impose the condition which it did impose.

*Curtin*, in support. As to s. 76 of the Statutes Amendment Act, 1941, considered in connection with s. 22 of the Town-planning Act, 1926:

A. In any event, s. 34 does not prevent the control of future user. The most that may be said is that it merely restricts the control of future user. Section 76 of the Statutes Amendment Act, 1941, makes provision for the local authority to enforce its scheme, so far as user is concerned, in relation to buildings already existing at the time, when the user is changed. Section 22 of the Town-planning Act, 1926, gives power to the local authority to refuse to permit the erection of a building contravening the scheme, not only by its outward appearance, but also

by the use to which it is to be put. Section 76 of the Statutes Amendment Act, 1941, went further still, saying that improper use of a building already erected could be stopped. When the scheme came into force, s. 22 imposed on the local authority an obligation to enforce its scheme ;  
5 see s. 22 (1). The word "works", used in s. 22, includes works which offend not only by their nature, but also by their purpose or use ; and a similar meaning should be given to the word "work" in s. 34.

B. Alternatively, if it should be held that it is not within the power of a local authority to control future user, then the respondent has not  
10 endeavoured to control future user at all, but merely endeavoured to ascertain future user. It is clear from the wording of the condition that the respondent was communicating to the appellant the view it held—namely, that it thought the application was nothing more than a sham. Counsel for the appellant admitted that a local authority may  
15 have regard to the nature of the building in deciding whether a permit should be granted ; and he referred to a number of cases as examples of this. If the respondent is entitled to consider what the nature of the building is in relation to its immediate intended purpose, then the only question remaining open for argument is the manner in which the Council  
20 may seek to discover the nature of the building. Where a local authority has to determine an issue, it is entitled to consider such evidence as it thinks necessary to determine it, provided such evidence is not outside its sphere : *Reg. v. Local Government Board* ( (1882) 10 Q.B.D. 309, 326).

*Cleary*, in reply. Mr. *Oakley* said that the respondent had nothing  
25 before it to show that the appellant did not intend to violate its scheme ; and he referred to the passage in the judgment of the learned Judge that "it seems, indeed, the only way in which the Council could effectively  
"ensure that its powers and duty to enforce observance of its town-  
"planning scheme were effective." (*ante.*, p. 342, ll. 33-35). Both the  
30 respondent's and the learned Judge's observations assume that the respondent has a power of control, which is the very point in issue. To speak of "violating" necessarily presupposes that the Council has some control over future user of the premises.

As to respondent's submission regarding the desirability of the Council's  
35 having these powers under s. 34 ; the question is not as to desirability, but as to whether, on the bare construction of the section, those powers are conferred.

The respondent attached some importance to the case of *Downs and Poole, Ltd. v. Upper Hutt Borough* ([1950] G.L.R. 240), but that case,  
40 once again, was merely a case of refusal under s. 34 to permit factory extensions in a residential area.

The respondent was not entitled to conclude (as has been submitted) that the appellant's stated purpose was not its real purpose ; it did not  
45 say so ; and it asked for an undertaking that the premises would not be converted from a private hotel to a public hotel.

*Cur. adv. vult.*

GRESSON, J. This is an appeal from the judgment of *Fair, J.*,  
(*ante*, p. 339) in an action in which the appellant company unsuccessfully sought a writ of mandamus against the respondent corporation  
50 to command the latter to issue a permit in respect of certain alterations which the appellant desired to carry out to buildings upon land owned by it, situate at the corner of Cuba Street and Central Terrace in the city of Lower Hutt.

The facts are not in dispute. They require only to be stated in

bare outline. The appellant applied in December, 1950, for a permit under the respondent's building by-laws to alter the buildings to make them suitable for a licensed hotel. The respondent refused the application under s. 34 of the Town-planning Act, 1926, upon the grounds that in its town-planning scheme the site had been zoned for residential purposes, and under the scheme the erection of licensed hotels in the residential area was prohibited. Thereafter, requests were made to induce the respondent to reconsider its decision which, however, it refused to do. An appeal to the Town-planning Board was taken; it was dismissed. Then, in April, 1952, a further application was made by the appellant for a permit to make alterations to its buildings in accordance with plans and specifications then submitted to render the building suitable for a private hotel. The applications made in December, 1950, for a permit to convert the premises for use as a licensed hotel had been supported by plans showing the proposed alterations in which plans an area of approximately 1,300 sq. ft. was shown set aside as bar-room space. The plans supporting the application to convert the premises for use as a private hotel showed portions of the proposed building totalling an area of 1,300 sq. ft. set aside as recreation space. The portion so set aside as recreation space appeared identical with the portion set aside for bar space in the plans earlier submitted. The plans were not in conformity with the respondent's town planning regulations relating to general residential zones in that there was a failure to conform to a front yard space back of fifteen feet, but the respondent was willing to dispense with that requirement. The decision of the respondent in respect of the last application as contained in a resolution of the respondent Council passed on December 8, 1952, was :

That this application be approved and the necessary dispensation granted subject to the following conditions being acceptable to the company :

- (i) The bedrooms to be provided in the permanent building instead of in the old wooden building as proposed by the application; the alterations to be constructed in permanent materials.
- (ii) That, in view of the past negotiations and decisions with regard to the use of this building, an undertaking be given to the Council that the company does not propose to convert this building from a private hotel to a licensed hotel.

The appellant made no appeal from that decision to the Town-planning Board but instituted (after due notice) on February 18, 1953, the action seeking a mandamus.

It was not disputed that the respondent corporation was influenced by the knowledge that, on May 11, 1951, application had been made to the Hutt Licensing Committee under s. 19 (3) of the Public Works Amendment Act, 1948, for the removal of the licence attaching to the Hotel Cecil in Wellington to premises to be erected on the corner of Cuba Street and Central Terrace in the city of Lower Hutt; that the application had been considered by the Licensing Committee on June 17, 1951, which had decided that the Wellington Licensing Committee be recommended to grant such removal; that on May 14, 1951, an application had been filed by Charles John McParland for a publican's licence in substitution of the former Hotel Cecil licence to be issued for premises intended to be erected on the corner of Cuba Street and Central Terrace; and that Charles John McParland was a director of, and a substantial shareholder in, the appellant company. The application relating to the removal of the licence has not yet been determined by the Licensing Committee.

It was contended on behalf of the appellant that the respondent had no power to impose a condition as to future user ; that, if the proposed buildings complied with the by-laws, the appellant had a right to the issue of a permit. It was not disputed that the proposed alterations would comply with the by-laws. It was further contended that, though where a scheme has been finally approved by the Town-planning Board, statutory provisions (Statutes Amendment Act, 1941, s. 76 ; Town-planning Amendment Act, 1948) enable a local authority to restrain the use of buildings in a manner not in conformity with its scheme, since in this case the scheme had not been finally approved there was no power to control the future use of a building and thus to seek to put itself in the same position as if its scheme had been approved. Further, it was contended on behalf of the appellant that, under s. 34 of the Town-planning Act, 1926, which was the sole source of its power, the local authority was confined to a refusal of its consent to the erection of any building or the carrying-out of any work only upon the grounds set out in the section, which grounds did not extend to authorize control of future use.

Whether or not the respondent Council's action in this case was warranted depends wholly upon the proper construction of s. 34. Under that section the respondent can :

Absolutely or conditionally refuse its consent to the erection of any building or the carrying-out of any work . . . or may definitely prohibit the erection of such building or the carrying-out of such work, if it appears to such local authority that the erection of such building or the carrying-out of such work would be in contravention of the scheme if it had been completed or approved, or would be in contravention of town-planning principles, or would interfere with the amenities of the neighbourhood.

The buildings and works contemplated did contravene the scheme in that the " front yard " requirements prescribed for a private hotel in a general residential zone had not been complied with ; but the respondent intimated its readiness to dispense with this requirement subject to an undertaking being given that the applicant did not propose to convert the building from a private hotel to a licensed hotel. Under the respondent Council's regulations embodying its scheme, a licensed hotel is not permitted within a general residential zone, but since the application was for a private hotel the buildings and work contemplated and for which a permit was sought would not have been in contravention of the scheme. There were, however, circumstances which were sufficient to lead the respondent Council to be apprehensive that the ultimate purpose of the buildings was for use as a licensed hotel. The issue is, therefore, whether the respondent Council may refuse its consent to buildings and works which as buildings and works did not offend and which were to be used in a way that would not offend but which were readily convertible to a use which would offend, and which use the applicant had already sought to have approved and might be thought still to have in contemplation. Though the carrying-on of the work and the erection of the building would not contravene the scheme, it is manifest that there is a possibility, even a likelihood, that a subsequent change of user will cause the building to offend. If the respondent Council had had its scheme finally approved and had thereafter given a permit for the building and carrying-out of the work " as a private hotel ", s. 76 of the Statutes Amendment Act, 1941, contains provisions adequate to restrain any change of user or purpose. But these provisions are applicable only where a scheme has been finally approved by the Town-

planning Board. They would not apply if the respondent Council should grant the permit sought "for a private hotel" and thereafter the premises should be used as a licensed hotel.

The power "conditionally" to refuse consent entitles the respondent to refuse a permit where the proposed buildings are to be used for a purpose which contravenes the regulations constituting the scheme. That is not the case at present but there is good ground for apprehension. It was argued that there was no power to attach conditions relating to user, or which were unlimited as to time. There is not, however, anything in the empowering section to support the view that the generality of the power given is limited or qualified in any way. Indeed, the Schedule to the Act which enumerates the matters for which provision must be made in accordance with s. 15 makes express reference to uses and to purposes. In my opinion, therefore, the respondent Council's power to impose conditions was not limited to the physical nature of the proposed buildings but extended as well to the purposes to which the proposed buildings were to be put, that is to user. Had the Council's decision been expressed as a refusal to permit the erection of the building and the carrying-out of the work except for the purposes of a private hotel such a decision would, in my opinion, have been within the Council's power. But the Council did not give its decision in those terms—for the very good reason that the provisions of the amending Acts of 1941 and 1948 which were obviously designed to prevent a change of user subsequent to the grant of a permit have no application, the scheme being as yet not "finally approved". The respondent Council took instead the course of imposing as a condition that the applicant should undertake not to convert the building from a private hotel to a licensed hotel. The position is, therefore, that the respondent Council refused its consent conditionally—namely, unless, and until, such an undertaking should have been given. In my opinion, a conditional refusal so expressed was within the power of the respondent Council. It is entitled, I think, to take the view that the erection of a building designed originally for use as a licensed hotel and in respect of which a permit had originally been sought on the basis of its being so used and which would be capable without any structural alteration of being at any time put to such use contravenes the scheme and town-planning principles, unless there is an assurance that there will not be a change. The question in issue depends, of course, upon the actual language of the section construed in relation to the general context of the Act and the subject-matter with which it is dealing. I do not find any justification for reading it with the qualification for which counsel for the appellant contended. In my opinion, the wide and comprehensive language of the section permits in the particular circumstances of this case the imposition of the condition attached to the respondent's refusal to issue a permit.

I respectfully concur with *Fair, J.*, that "power to impose a reasonable condition seems the natural and desirable complement of, or alternative to, a power of absolute refusal" (*ante*, p. 342, l. 29). In the light of the history of the applicant's repeated attempts to obtain approval of the use of the premises for the conduct of a licensed hotel and the preservation of the space originally intended for the bar, the condition is certainly reasonable, and, indeed, may be regarded as necessary to preserve the integrity of the scheme. The respondent in exercise of its powers under s. 34 of the Town-planning Act, 1926, conditionally refused a permit and the condition attached to the refusal was, in my opinion, one that respondent could validly impose under the section. I think accordingly



that the appeal should be dismissed and that the respondent should be allowed costs on the middle scale.

STANTON, J. I have had the advantage of reading the judgment of Gresson, J., (*ante*, p. 349) and I agree with the conclusion at which he has arrived and desire to add only a few words.

Counsel for the appellant relied on a contention that the respondent was seeking to control the future use of buildings and invited us to say that it had no such power. It may well be that s. 34 does not authorize a local authority to exercise the same control over the user of property as can be exercised when its town-planning scheme has been finally approved, but the circumstances in this case involve other considerations. The respondent might well have said that the proposed "private hotel", based on and adhering to the plans submitted for a licensed hotel, with its extensive "recreation space" convertible without further consent of the local authority into the bar as originally planned, was calculated to contravene its town-planning scheme, and it could, therefore, have refused its consent under s. 34. The local authority, however, exercised a less harsh power and said that it would accept an assurance or undertaking that such conversion would not take place. That the appellant refused to give the required undertaking lends some support to the respondent's view that the proposed work was intended to be what its lay-out suggested, and, in all the circumstances, I think that the respondent was acting within its powers in conditionally refusing its consent to the carrying-out of the proposed work by the appellant.

NORTH, J. I have had the opportunity of reading the judgments prepared by Gresson, J., (*ante*, p. 349) and Stanton, J., (*supra*, p. 353) and I agree with them that this appeal cannot succeed. I desire, however, to say that, in my view, s. 34 does not authorize a local authority to require an applicant to bind himself indefinitely as to the future use to be made of the new buildings or works, the plans of which have been submitted to the local authority for its approval under the Town-planning Act, 1926, for I do not think that the wording of the section justifies such a conclusion, and I would mention that, if the respondent's argument was accepted, then the further question would immediately arise—namely, whether the undertaking, when given, is to be regarded as the personal undertaking of the then owner or whether it binds his assigns as well. On the other hand, it seems to me to be inescapable that the provisions of s. 34 apply both to the physical structure itself and to the use proposed to be made of the premises, for how otherwise is a local authority to be in a position to determine whether an application offends against its town-planning scheme, if it has one, or against town-planning principles, or adversely affects the amenities of the neighbourhood? It surely cannot be suggested that town-planning schemes, or principles, or the amenities of a neighbourhood are affected only by the appearance of buildings and not by the use they are put to.

Thus, in the present case, the zone in question is a "general residential" zone, where private hotels are permitted but not licensed hotels. In another zone, light industries might be tolerated but not heavy industries. Yet, in each case, the physical structure may be substantially the same in appearance and design.

It seems to me that a local authority must be regarded as having power under s. 34 to require the applicant to state the use to which it proposes to put the premises. If this be conceded, then it surely must



follow that a local authority, if it is dissatisfied with the answer or has otherwise been put on the alert, is entitled to call on the applicant for an assurance as to its intentions. So far as I can see, that is really all that has happened here. The respondent said that it had decided to approve the application for a permit and grant the necessary town-planning dispensation subject to the following conditions being acceptable to the appellant:

- (b) That in view of the past negotiations and decisions with regard to the use of this building an undertaking be given to the Council that your company does not propose to convert this building from a private hotel to a licensed hotel.

The language is not as clear as one would like, but I do not regard this condition to be a demand by the respondent for an undertaking that the premises would never be used as a licensed hotel. I think the proper interpretation is that the respondent desired an undertaking from the appellant that its application was being made in good faith and I think that the respondent, in all the circumstances, was entitled to withhold its consent when such an undertaking was refused.

*Appeal dismissed.*

Solicitors for the appellant: *Perry, Perry, and Pope* (Wellington).

Solicitors for the respondents: *Hogg, Gillespie, Carter, and Oakley* (Wellington).

## PAULEY v. DUNSTAN RABBIT BOARD.

SUPREME COURT. Dunedin. 1954. March 12; April 12. ARCHER, J.

*Rates and Rating—Rabbit Board—Certificate by Ratepayers' List compiled in accordance with Statutory Provisions—Such List not Invalid by Reason of Secretary's Signing Same after Date by which It was to be made—Failure to prove Valid Rate Demand not affecting Jurisdiction—Proof of Demand may be waived—Rabbit Nuisance Act, 1928, s. 39.*

A certificate given by the Secretary of a Rabbit Board certifying that a ratepayers' list was compiled in accordance with the provisions of the Rabbit Nuisance Act, 1928, and the Rabbit Nuisance Amendment Act, 1947, is not invalid as a valuation roll for the assessment of rates because it was signed on September 6, 1950, as that fact does not support an inference that the list itself was not made until after the date prescribed by s. 39 of the Rabbit Nuisance Act, 1928—namely, September 1, 1950.

Failure to prove a valid demand to the ratepayer for rates owing by him is not a matter affecting the jurisdiction of the Court, but, if it should be so, waiver is permissible by virtue of s. 3 of the Inferior Courts Procedure Act, 1909. If however, proof of demand is no more than an essential requirement in establishing a Rabbit Board's claim for rates, it is a requirement which can be waived.

*F. J. Fawcett, Ltd. v. Levien* ([1931] N.Z.L.R. 481; [1931] G.L.R. 42) and *New Zealand Sheep-farmers' Agency, Ltd. v. Mosley and Hill* ([1932] N.Z.L.R. 849; [1932] G.L.R. 589) applied.

An arrangement under which a ratepayer agreed to pay a portion of the rates claimed from him in consideration of an adjournment of the action claiming such rates, is consistent only with an acknowledgment by him that the rates in question had been validly demanded; and such conduct amounts to a waiver of proof of demand by the Rabbit Board.

*Quare*, Whether, had there been no such waiver, the Board would have been entitled to remedy its omission to prove demand by calling further evidence at the hearing of an appeal to remedy an omission in formal proof at the hearing before the Magistrate of a claim for the rates alleged to be due by the ratepayer.

*Seagar v. Wellington City Corporation* ([1951] N.Z.L.R. 1060; [1952] G.L.R. 45); *Wilson v. Nisbett* ([1953] N.Z.L.R. 884) and *Gillard v. Cleaver Motors, Ltd.* ([1953] N.Z.L.R. 885) referred to.

APPEAL against the whole of a final determination of the Magistrates' Court given at Alexandra on August 5, 1953, whereby judgment was given for the respondent Board for a sum of £17 18s. 8d., for rates alleged to be due by the appellant, together with costs thereof.

5 The notice of appeal set out four grounds on which it was alleged that the Board had failed to prove that conditions precedent to the recovery of the rates had been observed, but at the hearing of the appeal two of these grounds were abandoned, and counsel for the appellant relied only upon the remaining grounds—namely:

10 (1) That the respondent had failed to compile a ratepayers' list as prescribed by s. 39 of the Rabbit Nuisance Act, 1928, and

(2) That the respondent had failed to demand from the appellant the rates alleged to be due from her.

In the Magistrates' Court, the secretary of the Board produced what was claimed to be the ratepayers' list, and upon which the name of the appellant was entered. At the end of the list, was a certificate by the Secretary of the Board which read as follows:—

I, WILLIAM FRANCIS PEDOFKY, Secretary of the DUNSTAN RABBIT BOARD, do hereby certify that this Ratepayers' List was compiled in accordance with the provisions of the Rabbit Nuisance Act, 1928, and the Rabbit Nuisance Amendment Act, 1947.

Signed at Alexandra this 6th day of September 1950.

W. F. PEDOFKY.

The list bears a date-stamp indicating that it was received at the Magistrates' Court, Alexandra, on September 6, 1950, and also the words:

List as amended, initialled and signed by me is allowed.

A. E. DOBBIE

Stipendiary Magistrate.

30 *Gilbert*, for the appellant.  
*Guest*, for the respondent.

*Cur. adv. vult.*

ARCHER, J. Section 39 of the Rabbit Nuisance Act, 1928, provides that the Secretary of the Board shall cause to be made a list, to be called the ratepayers' list, and that such list shall be made on or before September 1, in each year in which a general election of members is to be held. The list now under consideration was prepared for the purpose of the first election of members of the respondent Board and it is agreed that to comply with s. 39 it should have been made on or before September 1, 1950. It is not disputed that the list was properly deposited for inspection at the Magistrates' Court at Alexandra, or that Mr. A. E. Dobbie, S.M., subsequently heard and determined objections to the list and signed the list after correction, in accordance with the provisions of ss. 43 and 44 of the Rabbit Nuisance Act, 1928.

45 The appellant contends that the certificate of Mr. Pedofsky shows that the list was not made until September 6, 1950, and that it is, therefore, invalid as a valuation roll for the assessment of rates.

I am not satisfied, however, that Mr. Pedofsky's certificate should be so construed. The certificate does not say that the list was made on September 6, 1950, but, on the contrary, purports to certify that it was compiled in accordance with the provisions of the Rabbit Nuisance Act, 1928. If so, the list must have been made on or before September 1, 1950. The certificate purports to have been signed on September 6, 1950, but the fact that it was signed on that date does not, in my view, support the inference that the list itself was not made until after the date prescribed in the Act. 5

There is no other evidence to suggest that the Act was not complied with, and Mr. Pedofsky does not appear to have been cross-examined on the point. I therefore accept his certificate for what it purports to be—namely, a certificate that the ratepayers' list was, in fact, compiled in accordance with the provisions of the Act, and the first ground of appeal accordingly fails. 15

The second ground of appeal is that the Board failed to demand from the appellant the rates alleged to be due from her, or, stated more precisely, that the Board failed to prove a valid demand. It would appear from the somewhat scanty notes of evidence that the service of a demand upon the appellant was not expressly proved in evidence. The appellant contends that this was a vital defect in the Board's case. 20

There is ample authority for the proposition that a valid demand for rates is a condition precedent to their recovery, and, presumably, a failure to prove a valid demand would be fatal to a claim for rates unless the proof of demand can be waived and was in fact waived. No authority as to waiver was cited to me and I have been unable to find any direct authority, but I see no reason in principle why the proof of demand should not be waived. 25

I do not think that failure to prove demand is a matter affecting the jurisdiction of the Court, but, if it should be so, it is clear that waiver is permissible by virtue of s. 3 of the Inferior Courts Procedure Act, 1909. *F. J. Fawcett, Ltd. v. Levien* ([1931] N.Z.L.R. 481; [1931] G.L.R. 42), and *New Zealand Sheep-farmers' Agency, Ltd. v. Mosley and Hill* ([1932] N.Z.L.R. 949; [1932] G.L.R. 589). If, however, the proof of demand is no more than an essential requirement in the establishing of the respondent's case, I think it is a requirement which could be waived. 30

The conduct of the appellant before and during the proceedings in the Magistrates' Court was such as to suggest that proof of demand was intended to be waived in this case. The rate in question was struck on August 25, 1952, following a notice which was advertised on August 7, 1952. The appellant wrote to the Board on September, 9 1952, stating that she wished to appeal against the unduly high rate which had been struck, and her letter was treated by the Board as an application for remission of the rate, either wholly or in part, under s. 67 (a) of the Act. On September 26, 1950, the Board advised the appellant that it was unable to grant any remission. The summons for recovery of the rate was issued on April 14, 1953, and, after receiving the summons, the appellant and other ratepayers with whom she was associated approached the Board again, with a view to securing a reduction in their rates. 45

These cases were set down for hearing at Alexandra on June 10, 1953, but, on June 9, there was a conference between the solicitors for the objecting ratepayers and the solicitor for the Board, and an agreement was reached under which the objecting ratepayers undertook to pay 75 per cent. of the rates claimed, but without prejudice to their 55

rights in respect of the remaining 25 per cent., and the Board agreed to adjourn the hearing from June 10 to July 8, 1953. This arrangement was confirmed by letter and 75 per cent. of the rates claimed was duly paid. There was a further adjournment on July 8, 1953, to August 5, 1953. At the hearing on that date, there was considerable discussion as to the right of the defendants to some remission in their rates, and evidence was given that the Board had decided against remission. At the conclusion of the Board's case, counsel for the appellant moved for a non-suit on a number of grounds, including the ground first relied on in this appeal, but he did not raise the point that the Board had failed to make a valid demand upon the appellant, or had failed to prove such a demand.

I am of opinion that the character of the negotiations between the Board and the appellant, and the arrangement under which she and other 15 objecting ratepayers agreed to pay 75 per cent. of the rates claimed of them in consideration of an adjournment of their respective cases, was consistent only with an acknowledgment by them that the rates in question had in fact been validly demanded.

Waiver is the abandonment of a right, and is either express or implied from 20 conduct . . . Where the waiver is not expressed, it may be implied from conduct which is inconsistent with the continuance of the right.

As it is said in *13 Halsbury's Laws of England*, 2nd Ed., 207. The conduct of the appellant, in my opinion, amounted to a waiver of proof of demand by the Board.

25 Being of this opinion, it is unnecessary for me to consider whether, had there been no such waiver, the Board would have been entitled to remedy its omission to prove demand by calling further evidence at the hearing of the appeal. I confess that, having regard to the fact that s. 76 of the Magistrates' Courts Act, 1928, as amended, still provides that 30 all appeals shall be by way of rehearing, and, as it would appear to be desirable for the issue between the parties to be decided and concluded, I would have thought it reasonable for the Board to be permitted to call further evidence on appeal in order to remedy an omission in a matter of formal proof before the Magistrate. In view, however, of the decisions 35 in *Seagar v. Wellington City Corporation*, ([1951] N.Z.L.R. 1060; [1952] G.L.R. 45), *Wilson v. Nesbitt* ([1953] N.Z.L.R. 884), and *Gillard v. Cleaver Motors Ltd.*, ([1953] N.Z.L.R. 885), there would appear to be some doubt as to whether it would be proper for me to admit such evidence.

40 For the reasons which I have stated, however, I do not think that this appeal is entitled to succeed, and it will accordingly be dismissed, with £7 7s. costs to the respondent Board.

*Appeal dismissed.*

Solicitor for the appellant: *T. B. Mooney (Alexandra)*.

Solicitors for the respondent: *Gibson and Guest (Dunedin)*.

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## CONNOLLY ET UX v. PALMERSTON NORTH CITY CORPORATION.

SUPREME COURT. Palmerston North. 1954. August 17, 18.  
GRESSON, J.

*Municipal Corporations—Laying Drains through Private Lands—Distinction between Public Drain and Private Drain—Hearing of Objections—Duty of Council—Municipal Corporations Act, 1933, s. 223 (1) (b)—Ninth Schedule, cl. (d)*

The Municipal Corporations Act, 1933, does not define what is a public drain and what is a private drain. A public drain is a drain which is in the general interest of the city or borough, as opposed to one for the particular benefit of an individual or of one household.

The distinction is between a drain laid in connection with a particular property or even a drain laid to be used in common by two or more properties for the benefit of the particular household or households for whom it is installed, and, on the other hand, a drain laid to meet the needs of a group or collection of homes and to enable that settlement to be connected up to the general drainage system of the city. That it is laid on the private property of some individual does not necessarily preclude its being a public drain, if it had for its object or purpose the needs of a section of the public.

*Wellington and Manawatu Railway Co., Ltd. v. Mayor, &c., of Wellington* ( (1895) 14 N.Z.L.R. 472) referred to.

The hearing by a municipal council of objections to the laying of a drain by a private owner and the council's inquiry are judicial in character, and the objector must be given full opportunity of stating his objections and giving his reasons therefor, and, as well, opportunity of hearing what is urged in support of the proposals and freedom to comment on, criticize, and combat the reasons with which the proposal is supported.

MOTION for injunction and mandamus.

The facts sufficiently appear from the judgment.

*Hurley and Shires*, for the defendant.

*Gilliand*, for the plaintiff.

GRESSON, J. (orally). The plaintiffs in these proceedings challenge 5  
the validity of the defendant Corporation's expressed intention to construct and lay a public drain through land belonging to the plaintiffs. The matter has a long history, but the questions which govern it and which I am called upon to determine are: (1) Whether the proposed drain is, or will be when laid, a public drain; and (2) Whether the 10  
Council in all the steps taken by it has observed the requirements of the statute under which it has purported to act.

As regards the first question; it is one more of fact than of law. A subdivision of some "back" land owned by one Hart, and lying behind sections fronting on to Ferguson Street, has been effected; the 15  
only access from Ferguson Street is by means of a narrow strip over which a right of way appurtenant to each lot has been provided. The subdivision plan after approval by the Council was deposited in the Land Transfer Office as No. 16097. There is delineated upon such plan, what is called a sewer easement,  $9\frac{1}{2}$  links wide and running along the 20  
whole length of the southern boundary of the land contained in the subdivision plan. There is other land lying to the east and south of Hart's land owned by one Childs, and the drain which has in fact been

constructed by the corporation along the whole of this sewer easement is continued a few feet into Childs' land and there will be a further extension of the drain into that land to meet the drainage needs of houses which may hereafter be erected on that land. There is, too, further land owned by one Sherman lying behind or to the south and east of Childs' land and contiguous with it, and it is thought that some day this, too, may be subdivided. A grant of easement was duly registered on April 14, 1954, granting the Corporation the right of conveying sewage by pipes along the strip shown and for such purposes the right to lay down, construct and maintain pipes suitable for the purpose, with all such manholes, valves, etc., as are appropriate for such a sewer line. Between the southern extremity of the present line of drain, which has been constructed along the sewer easement, lies the land of the plaintiffs fronting upon Clifton Street for 66 ft., and having a depth of 170 ft. The Corporation's intention is to continue the drain along the western side of the plaintiffs' land out on to the road to join the existing sewer in Clifton Street. It is not practicable without pumping to discharge sewage from this "back land" into Ferguson Street because the level of Ferguson Street is so much above that of this "back land". It would be practicable to lead the pipe-line through Sherman's land out to Ruahine Street, another street which runs at right angles to Ferguson Street and parallel to Clifton Street, but the route would be a longer one and the Corporation prefer to take the line through the plaintiffs' land; 228 ft. of sewer has already been laid: a further 195 ft. requires to be laid to effect the junction with the sewer in Clifton Street.

The Municipal Corporations Act, 1933, does not define what is a public drain and what is a private drain. In my opinion, what is here contemplated and in part constructed is a public drain, that is, a drain which is in the general interest of the city as opposed to one for the particular or personal benefit of an individual or of one household. I think the distinction is between a drain laid in connection with a particular property or even a drain laid to be used in common by two or more properties for the benefit of the particular household or households for whom it is installed, and, on the other hand, a drain laid to meet the needs of a group or collection of homes and to enable that settlement to be connected up to the general drainage system of the city. That it is laid on the private property of some individual does not necessarily preclude its being a public drain if it had for its object or purpose the needs of a section of the public.

At the moment, this drain will not serve many, but the time may come when it will carry the sewage of a small community. In my opinion, it has characteristics which place it in the category of public drain. This view is consistent with the view taken by *Williams, J.*, in *Wellington and Manawatu Railway Co. v. Mayor etc., of Wellington* (1895) 14 N.Z.L.R. 472 where the learned Judge says: "There is nothing in 'The Municipal Corporations Act, 1876' which defines what a 'public drain' is. This, however, is certain; that it does not follow, because a drain is laid through private lands, that therefore it is not a public drain. . . . What the Corporation have, therefore, done is to treat this drain as part of their system, and in every way as a public drain, and to use it in a way which, if it were not a public drain, would be unlawful, and which could have been prevented by injunction by the company. The drain having thus been used as part of the Corporation drainage system for a number of years, I

"hardly think it material that the drain in its inception was not actually constructed by the Corporation. I have therefore little difficulty in holding that this is a public drain" (*ibid.*, 476).

There was in that case, as there is not in this, a history of past user as part of the city's drainage system. But, in this case, it is in contemplation that the new drains will become attached to one of the Corporation's sewers and become integrated into the city's drainage system. It has been constructed, and by the Corporation, with that object in view. That the subdividing owner has reimbursed the Corporation the costs of construction appears to me irrelevant. I hold accordingly that the drain is a public drain and as such vests in the Corporation by virtue of the Act and that the proposed extension will when completed similarly vest in the Corporation.

There remains the question whether there has been any disregard by the Council of the statutory requirements. It is understandable that any owner will resent interference with his proprietary rights but, when it is authorized by law in the general interest of the public, the private owner has to submit with a good grace. But it is equally the case that, where any invasion of private rights is authorized by statute, the terms of the statute must be strictly complied with. It does not appear to me that the Council has disregarded the terms of the statute. The plaintiffs' objection was considered at a meeting of which they had notice; they attended with their solicitor; their reasons for objection were heard and considered. The Council had then to determine whether to proceed with or to abandon the project. It exercises both judicial and administrative functions, and it is not easy to draw the line where the one ceases and the other begins. The hearing of the objections and the inquiry are judicial in character and the objectors must be given full opportunity of stating their objections and giving their reasons therefor, and as well opportunity of hearing what is urged in support of the proposal and freedom to comment on, criticize and combat the reasons with which the proposal is supported. It appears to me that all this they have had. The decision whether or not to proceed is for the Council to make; the Municipal Corporations Act, 1933, so provides. I do not think I am called upon to consider the merits of alternative proposals, but merely whether the plaintiffs were afforded a proper opportunity to present and to press their objections. I hold that they were given such opportunity and made full use of it. It was competent for the Council to decide that the course proposed was in its judgment the best in the circumstances and I find no grounds for interfering with its decision.

The motion for an injunction and a mandamus, therefore, fails and is dismissed.

The defendant is entitled to costs, which I fix at twenty guineas and disbursements.

*Motion dismissed.*

Solicitors for the plaintiff: *Jacobs and Grant* (Palmerston North).

Solicitors for the defendant: *Cooper, Rayley, Rutherford, and Bennett* (Palmerston North).

## VILE v. NEW PLYMOUTH CITY CORPORATION.

SUPREME COURT. New Plymouth. 1954. August 30, 31; September 1, 23. BARROWCLOUGH, C.J.

*Municipal Corporation—Negligence—Faulty Design of Bridge—Bridge causing obstruction of Stream by Holding-up Debris and causing Flooding of Adjoining land—Bridge constituting Unnecessary Nuisance, a Consequence not within Statutory Indemnity—Proof of Negligence not necessary—Negligence in Design of Bridge causing Damage—Damages—Injunction—Municipal Corporations Act, 1933, s. 173.*

The defendant Corporation, under statutory powers, constructed and maintained a pipeline, laid along that part of the highway which was nearest to the plaintiff's property and which crossed a stream on a special pipe bridge. The plaintiff's land was low-lying, and, when the stream was in flood, the water sometimes, though not very frequently, overflowed the land to a greater or less depth. The pipe bridge was owned by the defendant Corporation under statutory authority. It was built in 1953. Shortly after the pipe bridge was completed, there were two considerable floods in the stream. On February 3, 1954, the flood waters extended over the plaintiff's land to a depth of 3.3 ft. and invaded his house to a depth of about eight or nine inches above the floor-level. On March 8, 1954, the flood waters extended over the plaintiff's land, but did not rise to such a height as to invade the house. Considerable damage was caused on the occasion of the first flood to carpets and furniture in the plaintiff's house, and to a less extent to his land.

The plaintiff contended that the pipe bridge was an obstruction to the natural flow of flood-waters in the stream, and that the construction of the pipe bridge, so as to cause such an obstruction, was negligent and outside the Corporation's statutory authorization. He claimed damages and an injunction against the defendant corporation.

*Held*, 1. That, on the facts, during the February flood, the waters were raised higher than they would have been had the pipe bridge been better designed so as not to hold up debris carried by the flood.

2. That, in the way in which it was built, the pipe bridge constituted an unnecessary nuisance, in that the limited water-way which was provided produced a consequence which could readily have been avoided, with little, if any, additional expense; and that a consequence which could be so avoided was not within the Corporation's statutory indemnity, whether the nuisance was public or private.

*Irvine and Co., Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741; [1939] G.L.R. 390) followed.

3. That, an unnecessary nuisance having been established, the plaintiff was entitled to succeed under s. 173 of the Municipal Corporations Act, 1933, without proof of negligence.

4. That, furthermore, there was proof of negligence in the design of the pipe bridge; and, in consequence of such negligence, the plaintiff had suffered damage from flooding; and that he was entitled to judgment for £50 as damages, and an injunction in terms of the judgment.

*Geldis v. Bann Reservoir Proprietors* ( (1878) 3 App. Cas. 430) applied.

ACTION in which the plaintiff claimed damages and an injunction.

The plaintiff had recently acquired a parcel of land on the bank of the Mangorei Stream. The land was bounded northwards by that stream and eastwards by the Inglewood-New Plymouth State Highway which crosses the stream by means of a bridge. The plaintiff's land was upstream from the highway.

The defendant Corporation, under statutory powers, constructed and maintained a pipeline, which was laid along that part of the highway



which was nearest to the plaintiff's property and which crossed the stream on a special pipe bridge a few feet upstream from the traffic bridge. The plaintiff's land was low lying, and it was proved that, when the stream was in flood the water sometimes, though not very frequently, overflowed the land to a greater or less depth. This fact must have been known to the plaintiff before he bought the property as he had been familiar with the locality for many years. Nevertheless, he built a house on the land. The pipe bridge was owned by the defendant Corporation. It was built in the year 1953. The Corporation was not in any way responsible for the design or building of the traffic bridge, and that bridge was not its property.

Shortly after the pipe bridge was completed there were two considerable floods in the Mangorei Stream. On February 3, 1954, the flood waters extended over the plaintiff's land to a depth of 3.2 feet and invaded his house to a depth of about eight or nine inches above the floor level. On March 8, 1954, the flood waters extended over the plaintiff's land; but fortunately did not rise to such a height as to invade the house. Considerable damage was caused on the occasion of the first flood to carpets and furniture in the plaintiff's house and to a lesser extent to his land.

The plaintiff contended that the pipe bridge was an obstruction to the natural flow of flood waters in the stream, and that the construction of the pipe bridge so as to cause such an obstruction was negligent and outside the statutory authorization. He claimed damages and an injunction against the defendant Corporation.

*Ewart*, for the plaintiff.

*J. P. Quilliam*, for the defendant.

*Cur. adv. vult.*

BARROWCLOUGH, C.J. [After stating the facts, as above:] It was admitted by Mr. Mainland, the City Engineer, that, in designing the pipe bridge, he did not consider the possibility of floods in the Mangorei Stream, and that the height of the bridge was determined solely by a desire not to interfere with the regular gradient of the pipeline in that vicinity. Mr. Mainland conceded that the pipe bridge could have been built at a higher level, but he said that would not have enhanced the appearance of the plaintiff's property, that it would have created some further difficulty in providing access from the highway to the plaintiff's gate and to the strip of land along the river, which was a public reserve, and which might conceivably at some future time be converted into an esplanade for the use of the public. I am satisfied, however, that the difficulties mentioned by Mr. Mainland were only trifling, and that they certainly would not excuse the failure to raise the level of the pipe bridge if, on other grounds, it is found that that bridge was not constructed with adequate clearance.

It was common ground also that the cross-section of the waterway under the traffic bridge was 840 square feet in area, whereas the corresponding area under the pipe bridge was only 712 square feet—that is to say, the cross-section area of the waterway under the pipe bridge was about one-seventh less than the area under the pipe bridge. There was one other feature of the waterway under the pipe bridge that was said to be unsatisfactory. That waterway was not, as in the case of the waterway under the traffic bridge, in the shape of a parallelogram; but it tapered off towards either side of the stream so that at the two ends of the pipe bridge the depth of water tapered off a few inches only

and debris floating down the stream was more likely to be caught in these shallow places and further obstruct the flow of water at high flood. Finally, on the underside of the bridge in the main span, there were steel arches springing from the piers and waterborne logs and branches were likely to be caught in the spaces between the arches, the piers from which they sprang and the underside of the bridge which the arches supported.

There was some divergence between the witnesses on either side as to the height to which the February flood rose, at its peak, in relation to the pipe bridge and also as to the extent to which floating debris, caught at that bridge, obstructed the flood waters. The flood was proved to be a "flash" flood which, apart from any question of obstruction at the bridge, rose and fell very rapidly, and the witnesses for the Corporation may have been speaking of conditions they observed at a time slightly different from the time referred to by the witnesses for the plaintiff. I am satisfied, however, and I find as a fact, that at one time about the peak of the flood the waters were flowing over the top of the lower end of the pipe bridge to a depth of several feet, and that at the same time there was caught on that bridge a considerable amount of debris in the shape of logs, branches of trees, etc., which further obstructed the free flow of the water. This debris was removed by the City Council workmen and others, and, contemporaneously therewith but not necessarily as a result thereof, the flood waters began to subside fairly rapidly.

The matters just referred to would at first sight appear to convey, at all events to the mind of a person not qualified as an engineer, the impression that the waters upstream from the pipe bridge would rise higher than they would have risen had they not been obstructed by that portion of the pipe bridge which was under water and by the debris which was caught thereon and that the flooding of the plaintiff's land and house and his consequential loss would be greater and more extensive than would have been the case if there had been no such obstruction. It was contended by the Corporation, however, that such an impression would be wrong. Immediately after the flood, careful observations were made by Mr. Harris, a chartered civil engineer employed by the Corporation as a staff engineer in the City Engineer's office. Mr. Harris recorded, over an area above and below the bridge and in the vicinity of the plaintiff's house, the levels of the debris left by the flood. These were marked on the plan he prepared for the purpose of showing the gradient of the water level at the height of the flood. Without going into too much technical detail, his theory, and it was supported by another engineering expert called by the Corporation, was that the flood gradient was uniform from a point well upstream to a point well downstream from the bridge. It was said that this negated the plaintiff's claim that the bridge had caused any effective obstruction; because, if there had been such an obstruction, one would have found a pronounced drop in the gradient just below the bridge. It was not denied, as I understood the evidence, that the bridge did not cause some obstruction; but it was said that such obstruction as there was was ineffective and did not increase the flood level above the bridge, because in accordance with natural hydrographical laws the flow under the bridge would be accelerated; and that this would counter-balance the effect of the obstruction. The opinion was expressed that the depth of water over part of the bridge was produced by a shock wave which increased the level of the water at the bridge; but which would be

purely local and would not extend back over the plaintiff's land. Reference was also made to the venturi effect which would be produced at the waterway under the bridge as a result of the conditions prevailing at the peak of the flood. These theories were stoutly contested by the technical expert who gave evidence on behalf of the plaintiff.

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I should say at once that I was impressed by the careful observations made and recorded by Mr. Harris, and I accept the facts as stated by him with reference to the levels he took and the observations he made; but I find myself unable to agree with the conclusions at which he and Mr. Brodie arrived. In this conflict of engineering opinion I prefer the opinion of Mr. Worley, who is an engineer of wide experience and whose reconstruction of the matter seemed to me to be much more convincing. It was Mr. Worley's opinion that the reconstruction of the flood level by observation of the debris left on the ground was accurate only within about one foot. But more important, in my view, is the fact that the level of the debris does not necessarily show the level of the surface of the water during the whole of the time the flood was at its peak. If there was an appreciable obstruction at the bridge caused by logs and branches caught thereon, the line of debris below the bridge before that obstruction was removed would be different from what it was after the obstruction was removed and more water was free to pass the bridge and rise to a higher level below the bridge. In my opinion, the truth of that observation is not affected by Mr. Harris's "instantaneous levels" taken on March 8; when he was observing another and a lesser flood. And we have the fact that on the occasion of the March flood, the City Engineer promptly had a team of men on the bridge removing debris. It is difficult to understand why he should have taken that precaution if, in fact, the presence of debris caught in the bridge was unlikely to affect the flood level above the bridge. I have given to the technical evidence offered on behalf of the Corporation the best attention in my power; but I am forced to the conclusion—and I find as a fact—that during the February flood the waters were raised higher than they would have been had the bridge been better designed so as not to hold up debris carried by the flood.

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In arriving at this conclusion, I have not overlooked the fact that a portion of the water which flowed over the plaintiff's land came from another stream (the Waiwakaiho). But those waters were making their way into the Mangorei Stream above the pipe bridge. They can have no bearing upon the question as to the extent to which the waters of the Mangorei (augmented as they were by the overflow from the Waiwakaiho) were raised by the obstruction of the bridge, and the debris caught upon it.

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It is as to the extent of the increased flooding caused by the pipe bridge that I find my greatest difficulty. At several stages during the hearing I intimated to counsel that I thought precise evidence on that question would be necessary if I were to be in a position to assess the damages which resulted from the existence of the obstruction. No such evidence was called—probably because the engineers did not have sufficient data to enable them to express any confident opinion. My impression was that the flood was such that it would have overflowed the plaintiff's land and invaded his house in any event even if there had been no bridge over the river, but to what extent I cannot say. I am satisfied, however, that some additional damage resulted to the plaintiff as a result of the obstruction.

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Counsel made a praiseworthy attempt to agree on damages, and have submitted a memorandum showing that it is agreed,

(a) That the total damage resulting from the flooding was £418 3s.

(b) That, of this, £209 8s. 7d. was attributable to damage to floor coverings.

(c) That the nature of the damage other than to floor coverings was such that it is not possible to distinguish satisfactorily between damage occurring at floor level and at any higher level, although with some articles it appears that the damage must have increased as the level rose.

Counsel further agreed that, if the defendant was liable in damages, it would be necessary to make an arbitrary apportionment of them. I am obliged to counsel for this measure of agreement; but I do not feel justified in making an arbitrary apportionment that would be only a guess. The onus of proving damages lies on the plaintiff; and I do not feel justified in the state of the evidence in assessing at more than £50 the damages which could be said to result from that increased flooding which was attributable to the obstruction caused by the bridge during the February flood.

The Corporation built this bridge under statutory authority; but the plaintiff claims damages and an injunction on two grounds. He alleges, first, that the pipe bridge, constructed as it was constructed, unnecessarily and unreasonably obstructed the free flow of water in the stream and prevented the escape of flood waters. It was argued that this was a nuisance, and was, moreover, an unnecessary nuisance, in that the pipe bridge could quite reasonably have been constructed in a manner or to a design which would not have caused obstruction. In my view of the evidence that contention seems to have been abundantly established. There was not the slightest suggestion that the bridge could not have been built so as to afford at least the same clearance as was afforded by the traffic bridge. The disadvantages which this would involve as mentioned by Mr. Mainland and referred to earlier in this judgment were trifling. Mr. Worley said that, had he been designing the bridge, he would have taken care to see that the pipe bridge afforded at least the same clearance and waterway as was afforded by the traffic bridge, which had already been constructed a few feet downstream. I am not called on to say whether that would completely absolve the Corporation from liability. If the traffic bridge was inadequate, the Corporation, if it had built an absolutely similar bridge, might in very high flood be found to be liable jointly with the authority which built the traffic bridge. I am not now concerned with that; but I feel compelled to hold that, in the way in which it was built, the pipe bridge constituted an unnecessary nuisance. The limited water way which was provided produced a consequence which could readily have been avoided with little, if any, additional expense and it is clear that a consequence which can be so avoided is not within the statutory indemnity and that applies whether the nuisance be public or private: *Irvine and Co. Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741; [1939] G.L.R. 390). An unnecessary nuisance having been established, the plaintiff would be entitled to succeed under s. 173 of the Municipal Corporations Act, 1933, without proof of negligence.

The plaintiff's second contention, however, was that the bridge had been negligently and unskilfully constructed and that in consequence of such negligence he suffered damage from flooding. Though in some cases (as in *Irvine's* case) it may be impossible to prove negligence,

that was not so in the present action. I think it is clearly established that there was negligence in the design of the pipe bridge. As was said by Lord Blackburn in *Geddis v. Proprietors of Bann Reservoir* ((1878) 3 App. Cas. 430, 436) "an action does lie for doing that which the Legislature has authorized, if it be done negligently."

There will be judgment for the plaintiff for the sum of £50 as damages : the only damages he was able to prove. The plaintiff is also entitled to an injunction. Once again I am indebted to counsel who have agreed on the form which the injunction should take, if I were to decide that an injunction should be granted. The draft order submitted is not in the form I would myself have adopted had the matter been left in my hands ; but I think I should accept that draft as most likely to do substantial justice between the parties, and at the same time to cause as little disruption as is practicable to the water-supply of New Plymouth.

The only matter upon which counsel could not agree was as to the time within which the contemplated alterations should be completed. I fix that at seventy-five days, bearing in mind that the agreed draft order contains a provision that either party shall have leave to apply. In certain circumstances, it might be proper to extend that period. There will be an order in terms of paras. 1 and 2 of the draft agreed on, the period being fixed at 75 days. The plaintiff will have his costs calculated as on a claim for £500.

The case took two and one-half days and on one day the Court sat till 9.30 p.m. I certify for £36 15s. for the extra days of trial.

*Judgment for the plaintiff accordingly.*

Solicitors for the plaintiff: *Bennett and Ewart* (New Plymouth).

Solicitors for the defendant: *Govett, Quilliam and Hutchen* (New Plymouth).

## MOELLER v. NEW PLYMOUTH HARBOUR BOARD.

SUPREME COURT. New Plymouth. 1954. August 20, 30. STANTON, J.

*Limitation of Action—Actions against Public and Local Authorities—Action out of Time—Notice of Intended Action not given—Burden of Proof that Intended Defendant "not materially prejudiced" by Delay—Evidence of Plaintiff giving rise to Reasonable Inference that Defendant not materially prejudiced—Onus of Proof shifted to Intended Defendant—Accident, on which Intended Common-law Action to be based, within knowledge of Local Authority, and Intended Plaintiff available for Observation during Whole Period of Delay—Intended Defendant's Responsibility to Show it had not been materially prejudiced in Its Defence—"Materially prejudiced"—Limitation Act, 1950, s. 25 (2).*

Where leave to bring an action is sought under s. 23 (2) of the Limitation Act, 1950, after the time for commencing it has expired, on the ground that the intended defendant "was not materially prejudiced in his defence" by the delay in bringing such action, the burden of proof rests initially on the plaintiff. If he gives evidence from which it may be reasonably inferred that the intended defendant has not been prejudiced, then the burden of proof is shifted on to the shoulders of the defendant.

*Hayward v. Westleigh Colliery Co., Ltd.* ((1915) A.C. 540; 8 B.W.C.C. 278) and *Edymann v. Premier Accumulator Co., Ltd.* ((1916) 9 B.W.C.C. 384) followed.

It is a natural inference that an intended defendant was not materially prejudiced in his defence when the accident, on which an intended common-law action was to be based, happened in an operation being carried on by an officer of a local authority, and the intended defendant became immediately aware of it with all its attendant circumstances, and the intended plaintiff was in touch with the defendant and available for observation during the whole period of the delay. In such circumstances, it became the intended defendant's responsibility to prove that it had not been prejudiced.

Where the proper inference from the facts within the knowledge of the intended defendant was that they indicated negligence, it was held that the intended defendant was not materially prejudiced in its defence by the intended plaintiff's not having alleged negligence or the possibility of a claim for damages at the time of the accident.

APPLICATION under s. 23 (2) of the Limitation Act, 1950, by an intending plaintiff for leave to bring an action against the New Plymouth Harbour Board after the expiry of the period of limitation prescribed by s. 23 (1) (a) of that statute.

5 The plaintiff, who was an employee of the Board, was working on an operation involving the mooring of the S.S. *Hertford* on November 19, 1952, when a manilla hawser parted and one end of it struck him, fracturing his leg and otherwise severely injuring him. The plaintiff was taken to hospital and was in and out of that institution for varying periods up to June, 1954, and his condition had not yet reached a point at which his prospects of recovery could be assessed. He had been in receipt of regular payments of compensation from the Board and during the whole period has been totally incapacitated.

10 No formal notice of the accident was given and no intimation that a claim for damages would be made was given until April, 1954. The present application was filed on June 16, 1954, and, no action had yet been commenced.

*Jamieson*, for the intended plaintiff, in support.

*J. P. Quilliam*, for the intended defendant, to oppose.

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*Cur. adv. vult.*

STANTON, J. Mr. *Jamieson*, for the plaintiff, based his application on two grounds; first, that there was reasonable cause for the delay, and, second, that the Board was not materially prejudiced thereby.

25 As to the first ground, it appeared that, although the plaintiff's injuries were severe and his treatment prolonged, he was not incapable of transacting business or of considering his position. He was actually discharged from hospital on January 7, 1953, and except for a day or two at the beginning of February, he did not return until September 19, 1953. He was able to arrange for the collection of his compensation 30 moneys and on two occasions in July he collected the payments personally. What seems to have happened is that the plaintiff did not know there was any time limitation and he did not consult a solicitor till February, 1954. Some time was naturally absorbed in the making of inquiries, and on April 1, the plaintiff's solicitors wrote to the Board's 35 solicitors intimating that a claim for damages would be made, this being the first time that such a claim had been suggested.

The circumstances are materially different from those in *Glynn v. Taranaki Hunt Club, Inc.* ([1953] N.Z.L.R. 948);<sup>1</sup> and I would not think it could properly be said that there was reasonable excuse (or 40 cause) for the plaintiff's long delay in ascertaining his rights and putting forward his claim.

It remains, therefore, to consider whether the Board has been "materially prejudiced" by this delay. It was authoritatively stated by the House of Lords in *Hayward v. Westleigh Colliery Co., Ltd.* ([1915] A.C. 540; 8 B.W.C.C. 278) and confirmed in *Eydmann v. Premier Accumulator Co., Ltd.* ([1916] 9 B.W.C.C. 384) that in such a case while the burden of proof rests initially on the plaintiff, yet if he gives evidence from which it may be reasonably inferred that the defendant has not been prejudiced, then the burden of proof is shifted on to the shoulders of the defendant. In the instant case it would seem to me that, as the accident happened in an operation being carried out by an officer of the Board, that the Board were immediately aware of it with all its attendant circumstances, and that the plaintiff was in touch with them, and available for observation or examination during the whole period, it would be a natural inference that the Board would not be prejudiced by delay and it therefore became the responsibility of the Board to prove that they had been prejudiced. The evidence put forward on behalf of the Board was that they and their insurers immediately investigated the accident and satisfied themselves that:

(a) the system of work was satisfactory, as the Harbourmaster said; and

(b) the question of negligence did not appear to arise, as Mr. Croxson, manager of the insurance company, said.

It is now claimed that, if the plaintiff had at that time alleged negligence or the possibility of a claim for damages, fuller inquiries would have been made. It is also said that in this latter case it might have been possible to locate or identify an officer on the *Hertford* whose name was unknown. Finally, it was said that action could have been taken to test the appliances used in the operation and such tests are not now possible.

I cannot think that these matters show that the Board has been materially prejudiced by the plaintiff's delay. It is clear that all the facts were as much within the Board's knowledge as the plaintiff's. The only element missing was any allegation by the plaintiff that he claimed there had been negligence on the part of the Board's officers, not because of facts of which the Board were unaware, but that the proper inference from those facts was that they indicated negligence. That this was a possibility should have been evident to the Board and the affidavits of Mr. Flett and Mr. Croxson show that they gave consideration to it. Mr. Flett, in fact, goes further and says that he was concerned because this was the second accident of the same kind within less than six months. Responsible officers of a public body could not under the circumstances justify an investigation less searching than would have been called for by a clear intimation that the plaintiff claimed that there had been negligence in the carrying out of the Board's operations.

I think, therefore, that the plaintiff must be given leave to commence an action against the Board, but this must be done within fourteen days from the delivery of this judgment.

The costs of the application will be reserved.

*Leave given accordingly.*

Solicitors for the plaintiff: *Moss and Jamieson* (New Plymouth).

Solicitors for the defendant: *Govett, Quilliam, and Hutchen* (New Plymouth).

## THOMAS v. NELSON HARBOUR BOARD.

SUPREME COURT. Nelson. 1954. October 29; November 10.  
TURNER, J.

*Limitation of Action—Actions against Public and Local Authorities—Action out of Time—Notice not given—Material Prejudice of Intended Defendant—Distinction between Principles applicable to Intended Workers' Compensation Claim and Intended Common-law Action alleging Negligence—Limitation Act, 1950, s. 23 (1) (2)—Workers' Compensation Act, 1922, s. 26 (2).*

The purpose of s. 23 of the Limitation Act, 1950, is to protect public authorities from stale claims.

*R. B. Policies at Lloyds v. Butler* ([1950] 1 K.B. 76; [1949] 2 All E.R. 226) followed.

A claim is barred by the direct words of s. 23 (1) (a) of the Limitation Act, 1950, unless the intending plaintiff (if unable to show that his failure to give the required notice or his delay in bringing the action was occasioned by mistake or other reasonable cause) shows circumstances from which the Court can draw the inference that the proposed defendant was not materially prejudiced by the lack of notice.

Although s. 23 (2) of the Limitation Act, 1950, and s. 26 (2) of the Workers' Compensation Act, 1922, have almost identical wording, different principles are applicable to them. When an accident happens, if workers' compensation only is to be sought, it is sufficient to prove the employment, the fact of the accident, and that it arose out of and in the course of the employment. Where negligence is to be alleged, the details of the attendant circumstances may be of the highest importance, and details of fact may become matters of grave dispute.

Thus, in cases where the Court would allow a claim to be brought under the Workers' Compensation Act, 1922, correctly concluding that the employer would not be prejudiced by lack of notice, it would, nevertheless, decline to authorize the commencement of a common-law action for negligence based upon the same facts, holding that the employer would be materially prejudiced in his defence to such claim.

*Moeller v. New Plymouth Harbour Board* (*ante*, p. 366) distinguished.

APPLICATION for leave to issue a writ, brought under s. 23 (2) of the Limitation Act, 1950. It was conceded by both sides that the provisions of s. 23 applied to this case.

The facts sufficiently appear from the judgment.

5 *Arndt*, for the intended plaintiff in support.

*Macarthur*, for intended defendant to oppose.

*Cur. adv. vult.*

TURNER, J. It is admitted that on May 19, 1952, the intending plaintiff, Keith Charles Thomas (to whom for the sake of convenience I will refer hereinafter as the "plaintiff") was working as an employee of the Nelson Harbour Board (now sought to be joined as defendant, and hereinafter referred to as "the Harbour Board"), and that, while so working, he suffered an injury through some iron falling on him. No written notice was given, such as is now required by s. 23, but the fact of the accident's having taken place was brought to the notice of the Harbour Board's wharfinger immediately. The plaintiff spent some considerable time in hospital, but it is not suggested that his condition



or treatment prevented him from giving the requisite notice, and it is not contended that failure to give the notice, continued as it has been right down to the filing of the present application in March, 1954, is excused on the ground of mistake or reasonable cause. It is contended, however, by Mr. Arndt that the Harbour Board has not been materially prejudiced in its defence by the delay. 5

The affidavits filed by the plaintiff depose that on the evening of May 18, 1952, a cargo of corrugated iron in one-ton crates had been discharged by other employees of the Harbour Board and that these crates were stacked by such employees on the wharf. On May 19, the plaintiff was employed on the wharf, and was instructed by his foreman to locate a particular crate among the items of cargo. He discovered this crate under a tarpaulin, resting on edge against a stack of other crates. The base of it was broken away, and while the plaintiff was about to attach a crane-hook to it, the crate fell over on his leg, without warning, and injured him. The plaintiff's affidavit concludes by deposing that he has been advised that in these circumstances he has a good cause of action against the Harbour Board on the ground that the cargo was negligently stacked. Other affidavits depose that upon the accident's happening, the Board's wharfinger was orally notified, and that an account of the accident, substantially similar to the above version, was given to him. 10 15 20

The affidavits filed on behalf of the Harbour Board do not entirely agree with the version of the facts which I have set out above. It appears to be conceded that the accident occurred to the plaintiff in the course of his employment on May 19, 1952. The Harbour Board denies, however, that it was ever notified, even by remote implication, that any question of negligence was involved. The wharfinger deposes to having heard of the accident at the time, but says that he does not remember any allegation which would support a suggestion of negligent stacking, and he quotes his report of the accident, made forthwith to his superiors, as stating that plaintiff was "slinging up crates of galvanized iron" and that the accident was caused as follows: "crate he was slinging slipped off stack, knocking him down and breaking leg (right)". It is alleged, moreover, that the crates were half-ton crates and not one-ton crates. The Harbour Board now contends that it has been materially prejudiced in its defence of an action for common-law negligence by reason of the delay in notice, and Mr. Macarthur points out particularly that the version of the accident now sought to be established by plaintiff differs materially from that of which the Board has a record: that, if negligent stacking is alleged, it would be material to examine and to call as witnesses those who stacked the cargo and that, in fact, these were casual employees, not Union workers, and that their present whereabouts are not now known: also, that the surface of the wharf upon which the cargo was stacked has been re-timbered since the accident, and that it is now impossible to reconstruct the situation as it existed on the material date. 25 30 35 40 45

Mr. Arndt, in support of the application, points out that the words of s. 23 of the Limitation Act, 1950, are similar to those of s. 26 (2) of the Workers' Compensation Act, 1922. He therefore invites me to construe s. 23 as the latter section has been construed, and cites *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. pp. 482 *et seq.*, paras. 958 *et seq.* and the corresponding statement in *Willis on Workmen's Compensation*, 37th Ed. 424. The cases under the Workers' Compensation Acts are well-known, particularly *Hayward v. Westleigh* 50 55

- Colliery Co., Ltd.* ([1915] A.C. 540; 8 B.W.C.C. 278); *Eydmann v. Premier Accumulator Co., Ltd.* ([1916] W.N. 140; 9 B.W.C.C. 384) and *Lochgelly Iron and Coal Co., Ltd. v. Hepburn* ([1917] S.C. (H.L.) 18; 10 B.W.C.C. 1) and, in New Zealand, *McCarthy v. Union Steam Ship Co. of New Zealand, Ltd.* ([1916] N.Z.L.R. 1154; [1916] G.L.R. 820) and *Sillick v. Taupiri Coal-Mines, Ltd.* ([1922] N.Z.L.R. 513). It is clear from these cases that, once it is shown by the plaintiff that the circumstances lead to a general inference that the defendant has not been prejudiced, the Court will not place upon the plaintiff the burden of establishing a negative proposition, and it is then for the defendant to demonstrate particular prejudice. These cases have been followed by *Stanton, J.*, in New Zealand in an application recently brought under s. 23 of the Limitation Act, 1950, for leave to commence a common-law action. In *Moeller v. New Plymouth Harbour Board* (*ante*, p. 366), he granted leave to issue proceedings in a case where a plaintiff has been injured by the snapping of a hawser when a ship was being moored, after a delay quite comparable with that in the present case. In *Moeller's* case, however, it was clear (to quote the actual words of *Stanton, J.'s* judgment): "that the accident happened in an operation 20 "being carried out by an officer of the Board and that they were "immediately aware of it with all its attendant circumstances" (*ante*, p. 368). In these circumstances, it seemed a natural inference to *Stanton, J.*, that the defendant Board would not be prejudiced by the delay, particularly as it was shown that immediately after the accident 25 the defendant and its insurers had held a full investigation as to its causes.

- In the present case, however, the facts are widely different. It is a matter of dispute, even, whether the manner in which the accident is now said to have happened was ever brought to the notice of the 30 Board's officer. The plaintiff's witnesses say that it was. But the only report that he made is to a different effect. It is clear, therefore, that whatever was orally said at the time between the plaintiff's co-employees and the Board's wharfinger, the Board's senior officers were never notified in consequence of attendant circumstances, such as are 35 now alleged, and no attempt was made at any complete investigation of the causes of the accident. This completely distinguishes the present case from *Moeller's* case (*ante*, p. 366).

- It seems to me that, although the two statutes contain provisions of almost identical wording, widely different principles may have to be 40 invoked in their application. For, where an accident happens, if workers' compensation only is to be sought, it will be sufficient to prove the employment, the fact of the accident, and that it arose out of and in the course of the employment. If the happening of the accident is contemporaneously brought to the notice of the employer, the details 45 of the attendant circumstances are seldom of importance; but, where negligence is to be alleged, they may be of the highest importance. Questions of safe system may be in issue; details of fact will in such cases often be matters of grave dispute. This difference in the importance of the details of surrounding circumstances in the two types of claim 50 seems to me to compel a different approach in applying the provisions of the two statutes; and I am disposed to think that, in many cases where the Court would allow a claim to be brought under the Workers' Compensation Act, correctly concluding that the employer would not be prejudiced by lack of notice, it will, nevertheless, decline to authorize 55 the commencement of a negligence action based upon the same facts,

holding that the employer would be materially prejudiced in his defence to such a claim.

I so hold here. I cannot avoid the conclusion that the Harbour Board has been prejudiced in its defence. If as soon as practicable after March 19, 1952, the plaintiff had given to the Board reasonable information of the circumstances that are now alleged to support negligence, it would have been possible for an investigation to have been made, with some chance of reconstructing the facts, and with a material chance of locating the men who had stacked the cargo. In a case like the present one, a plaintiff, before the passing of the Limitation Act, 1950, could have proceeded without having complied with the somewhat stringent requirements as to notice now contained in s. 23. It is probably not as widely known as it should be that the statute now makes these requirements. They appear not only to be new in this country, but to be a refinement on the British legislation, which does not seem to require the notice prescribed by the new New Zealand section. But the statute is there for a purpose, and that purpose is obviously to protect public authorities from stale claims. The words of *Stratfield J.*, in *R. B. Policies at Lloyds v. Butler* ([1950] 1 K.B. 76, 81; [1949] 2 All E.R. 226, 229) confirm this view. This claim is barred by the direct words of the statute, unless the plaintiff shows circumstances from which I can draw the inference that the Harbour Board was not prejudiced by the lack of notice. I have held that the evidence shows the contrary, and the application must consequently fail. The leave sought is refused.

Nothing was said in the argument about costs, and they are consequently reserved.

*Leave refused.*

Solicitors for the plaintiff: *C. J. O'Regan and Arndt* (Wellington).

Solicitors for the defendant: *Chapman, Tripp, and Co.* (Wellington).

### MADDERS *v.* WELLINGTON TECHNICAL SCHOOL BOARD OF MANAGERS.

SUPREME COURT. Wellington. 1954. October 8; November 10.  
TURNER, J.

*Limitation of Action—Action against Person acting in Execution of Public Duty—Notice of Intended Action—Notice to contain Intimation of Intended Action—Solicitor's Failure to give Notice not Excusing Intending Plaintiff's not giving Notice in Time—Delay in giving Notice making impossible any Adequate Inquiry into Matters affecting Defence—Leave to commence Action refused—Limitation Act, 1950, s. 23 (1) (a), (2).*

The notice required by s. 23 (1) (a) of the Limitation Act, 1950, must contain an intimation that it is intended that an action should be brought; and it should further contain reasonable details of the cause of action alleged, and of the facts which are alleged to support it.

Failure on the part of an intending plaintiff's solicitor to give the notice required by s. 23 (1) (a) does not excuse such intending plaintiff, as he must accept the consequences of his solicitor's action or inaction.

*Morrison v. Liddle Construction, Ltd.* ([1951] G.L.R. 219, 222, 223) and *Stewart v. Papakura Borough* ([1952] N.Z.L.R. 799) followed.

Where, owing to delay in giving the notice required by s. 23 (1) (a), it has become impossible for an intended defendant to make adequate inquiry into matters on which a defence might be based, application to grant leave under s. 23 (2) to commence an action should be refused.

*R. B. Policies at Lloyds v. Butler* ([1950] 1 K.B. 76; [1949] 2 All E.R. 226) followed.

*Moeller v. New Plymouth Harbour Board* (ante, p. 366) distinguished.  
*Henderson v. Stewart* ([1955] N.Z.L.R. 141) referred to.

APPLICATION, under s. 23 (2) of the Limitation Act, 1950, for leave to bring an action after the expiry of the period of limitation prescribed by s. 23 (1) (a) of that statute.

- The plaintiff alleged that, upon her departure from a lecture (the first of a series) on the premises of the defendant Board on the evening of March 18, 1952, she was injured through falling on an unlighted path. She applied for leave to commence an action against the defendant Board, notwithstanding the fact that she had allowed more than one year to pass since the date when the cause of action accrued, and that her action was consequently barred by s. 23 of the Limitation Act, 1950.

The facts sufficiently appear from the judgment.

*O'Flynn*, for the intended plaintiff, in support.

*Stewart Hardy*, for intended defendant Board, to oppose.

*Cur. adv. vult.*

15

TURNER, J. It is common ground that the period of limitation imposed by s. 23 applies to the present case.

- If this application is to be granted, it will be necessary for me to conclude that the plaintiff's failure to give notice, or her delay in bringing the action, as the case may be, was occasioned by mistake or some other reasonable cause, or that the defendant Board will not be materially prejudiced in its defence or otherwise by such failure or delay.

- It is the plaintiff's failure to give notice which is relied upon by the defendant Board as the material ground for opposing this application; for, if adequate notice of intention to bring the action had been given, it is difficult to see how the defendant Board would in this case be prejudiced merely by the delay in bringing the action. Both parties conducted their argument on the basis that the failure to give notice was the material matter for consideration.

- I am of opinion that the plaintiff's failure to give notice is fatal to the present application. The only documents which are relied upon as notice in writing are her letters of March 21 and 24, 1952. Both these letters were addressed to the principal of the College but may be taken, for the purposes of this argument, to have been addressed to the defendant Board. The first of them reads as follows:

Dear Sir,

March 21, 1952.

On Tuesday March 18th I attended for the 1st time a drawing class at 7 p.m. in room A. 3.

- I have never been in the College or grounds before. I entered the building during daylight by the main entrance, and when I came out at 9 p.m. I used the exit nearest to A. 3 room. It was very dark indeed and there is not any lighting at all in that area. Not having been there before at any time I had no idea where I was. I heard someone walking and thought I was following them but I apparently

wasn't. I know I was walking on grass and came to what I thought was a curb and naturally I stepped down but to my horror I had walked over quite a steep bank and I rather think put my foot down a drain but of course being so very dark I could not see. I got up and was in very great pain in my right foot and with great difficulty I managed to get to the road with the aid of another student who called me a Black and White cab and was taken to hospital. I have been in bed since that night, and yesterday Thursday I had to go back to hospital to have my leg set in plaster, owing to the Metatarsal arch being dislocated. I shall have the plaster on for at least a month, and being in business is a great inconvenience to me.

I am writing this letter to let you know what has happened to me through lack of lighting in the grounds and something should be done about it, it is most dangerous. I think I am lucky to get away with only a dislocated foot and not a broken back or neck.

As the plaster I have on will be a walking plaster I hope to attend my lesson next Tuesday evening. I should have attended last Wednesday but you will understand now why I was not there.

Yours faithfully,

MOLLY K. MADDERS

It was followed by a second, three days later, reading as follows :

March 24th 1952.

Dear Sir,

Further to my letter of the 21st I am afraid I have completely over estimated my strength and will not be able to attend my drawing lessons for some time.

Today is the first day I have been able to get to my shop, I have a taxi here in the mornings and back again in the evenings, owing to the great difficulty I have in walking.

Yours faithfully,

MOLLY K. MADDERS

It will be seen from s. 23 (1) (a) that it is a pre-requisite of the present action that there should have been notice in writing as soon as practicable after the accrual of the cause of action, and that this notice must give reasonable information of the circumstances upon which the proposed action is to be based and of the name and address of the plaintiff and of her solicitor (if any) in the matter.

It may be noticed that the section does not distinctly say (as it might have done) that the notice should contain an intimation that it is intended to bring an action; it merely directs that the notice should contain reasonable information of the circumstances "upon which the proposed action will be based." I am of opinion, nevertheless, that the notice must contain an intimation that it is intended that an action should be brought and that it should further contain reasonable details of the cause of action alleged, and of the facts which are alleged to support it. The letters of March 21 and 24, 1952, undoubtedly notified the principal of the college of the fact that an accident had occurred to the plaintiff. I do not find in them, however, any intimation, express or implied, that a claim for damages is intended to be made or even that one is probable. The first letter would appear to have been written primarily as a notification of the fact that, in the plaintiff's opinion the lack of lighting in the college grounds constituted a danger to member of the public attending lectures, and, secondarily, as a note of the reason for the plaintiff's failure to attend the lecture on the Wednesday after the accident. The second letter, as will be seen, merely notifies the principal that the plaintiff will be absent from several more lectures.

To the two letters to which I have referred, the principal of the Board replied on March 26 as follows :

Dear Miss Madders :

I was distressed to learn that you had suffered such a painful accident at our college.

5 I cannot understand why the approaches to the Art School should have been so dark as they are ordinarily well lit. On investigation I discovered that one lamp had been broken and this has been replaced. There were, however, other lamps which should have been alight over the entrance to the college. I can only assume that these lights must have been turned out before you made your departure.

10 It was good of you to inform me of the accident, and you may be sure that steps will be taken to see that in future the lighting of this entrance is entirely adequate.

I trust you will make a rapid recovery and will soon be able to resume your studies at the school.

I am,

Yours faithfully,

E. G. COUSINS, Director

I interpret this letter as containing:

(1) an expression of regret at the happening of the accident ;  
20 (2) an intimation that some investigation had been made and that it had been found that one lamp had been broken and that it was possible that others had been switched off ;

(3) an intimation that, in future, through the notice which the plaintiff had been good enough to give, steps would be taken to make  
25 sure that there was adequate lighting above the entrance.

There is no reference, express or implied, in the principal's letter to any understanding of the fact that there might be a claim for damages presented by the plaintiff, and it is, indeed, apparent that no such thought had entered his mind, and that no investigation had been made of the  
30 thorough nature which would undoubtedly have been thought necessary if such a claim had been contemplated.

In these circumstances, I have no difficulty in concluding that no notice of the plaintiff's intention to bring an action, such as is necessary by virtue of s. 23 (1) (a), was given. Even if I had been of opinion  
35 that I could spell out from the letters a notice of intention to bring an action, I might still well have been left in doubt as to whether the letters gave in fact "reasonable information" as to the circumstances of the accident, since they do not make it clear where on the premises of the defendant Board (if, indeed, it was on those premises) the accident is  
40 alleged to have taken place. I do not need, however, to come to a definite view on this point.

Having concluded that no proper notice was given, I have now to decide whether the plaintiff's failure to give notice was occasioned by mistake or any other reasonable cause, or whether the defendant Board  
45 has been materially prejudiced in its defence. It was not argued that there had been any mistake. As to reasonable cause, all that is alleged to support this point is that the delay was due to the fault of the solicitors who were then advising the plaintiff. I think it proper to record the fact that Mr. O'Flynn was not at that stage her legal adviser.  
50 I do not think that it will assist the plaintiff in this case to place the responsibility for the delay on her solicitors, and will follow the judgments of the Compensation Court in *Morrison v. Liddle Construction, Ltd.* ([1951] G.L.R. 219, 222, 223) and *Stewart v. Papakura Borough* ([1952] N.Z.L.R. 799) in holding that, in cases like the present one, a plaintiff  
55 must accept the consequences of her solicitors' actions, or inaction.

I am left, therefore, to consider Mr. O'Flynn's main contention—namely, that the defendant Board has not been materially prejudiced in its defence by the plaintiff's failure to give notice.

I have considered carefully the authorities which Mr. O'Flynn cited, but, notwithstanding his persuasive and carefully-prepared argument, I have been unable to escape the conclusion that this application must be disposed of on the facts. If the defendant Board had in March, 1952, been notified that the action now contemplated was intended, it would undoubtedly have set in train inquiries on which a defence might have been based: such inquiries as to whether or not lights were switched on or switched off at given times; as to what time the lecture closed and how long the premises were lighted thereafter; as to what staff was in charge of lighting arrangements in the building; as to the nature of the surfaces of the paths and lawns, and even the situation of steps and slopes in the grounds and their distances from lights—all these are matters which go to the very root of a possible claim by the plaintiff. It must in the nature of things be quite impossible for the defendant Board to make any adequate inquiry into these matters at this stage, and it would be depriving the section of the very effect which it was intended it should have if I were to grant leave to commence an action on the present application. As did *Hay, J.*, in a recent decision in *Henderson v. Stewart* ([1955] N.Z.L.R.141), I adopt the remarks of *Streetfield, J.*, in *R. B. Policies at Lloyd's v. Butler* ([1950] 1 K.B. 76; [1949] 2 All E.R. 226) when he said that: "It is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the Courts in recovering their property, but another, and, I think, equal policy behind these Acts, is that there shall be an end of litigation, and that protection shall be afforded against stale demands" (*ibid.*, 81; 229).

I have read the recent decision of *Stanton, J.*, in *Moeller v. New Plymouth Harbour Board* (*ante.*, p. 366). In that case, *Stanton, J.*, was able to conclude that, notwithstanding the lack of formal notice, the defendant Board was not prejudiced. The period of delay in that case was indeed substantial, but I find a crucial difference between claims by waterside workers against Harbour Boards, on the one hand, and claims like that before me, on the other. Where (as in *Moeller's* case), a watersider is involved in an accident while working a ship and the fact of the accident and all the circumstances surrounding it are brought to the notice of the defendant Board, it may in some cases be contended, according to the circumstances in which the accident happens, that the officers of the Harbour Board should regard an action for common-law negligence as a distinct possibility. In such a case as the present, it does not seem to me that the principal of a technical college would have his mind directed to such a possibility as a matter of ordinary day-to-day routine. I am clear on the facts that in the present case neither the principal nor the Board contemplated at any stage the possibility of an action for damages, and I do not think it is reasonable to say that they ought to have contemplated it. In these circumstances, I must conclude that the lack of notice materially prejudiced the Board in its defence, and the present application must consequently fail.

Nothing was said about costs on the hearing of the application. I will reserve this question.

*Application refused.*

Solicitor for the intending plaintiff: *F. D. O'Flynn* (Wellington).

Solicitors for the proposed defendant: *Stewart Hardy, Craig, and Morgan* (Wellington).

## NAPIER v. RYAN AND ANOTHER.

SUPREME COURT. Wellington. 1954. February 16, 17, 18; June 4, 8; August 18. BARROWCLOUGH, C.J.

*Negligence—Infant—Licensee or Trespasser—Merry-go-round—Proof of Licence—Person responsible for Control of Premises—Inference of Tacit Permission to Infant to enter upon Premises—Such Inference Question of Fact for Jury—Question of Law whether Evidence justifies Finding that Permission tacitly given—“Allurement.”*

The person responsible for the condition and control of premises is he who is in actual possession of them for the time being, whether he is the owner or not, or whether his possession is *de facto* or *de jure*, for it is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons.

*Hartnell v. Grayson Rollo and Clover Docks, Ltd.* ([1947] K.B. 901) followed.

*Davis v. St Mary's Demolition and Excavation Co., Ltd.* ([1954] 1 All E.R. 578); *Excelsior Wire Rope Co., Ltd. v. Callan* ([1930] A.C. 404); *Mourton v. Poulter* ([1930] 2 K.B. 183); and *Buckland v. Guildford Gas Light and Coke Co.* ([1949] 1 K.B. 410; [1948] 2 All E.R. 1086), referred to.

In order to justify an inference that tacit permission has been given to an child to enter upon another person's premises, it is necessary to prove either that such premises were habitually, or at least frequently, resorted to by children, and that this resort was in the knowledge of the occupier of the premises or his servants and with their acquiescence, or without the showing of any practical anxiety to stop the infant's frequenting those premises. There must be such assent to the user relied upon as amounts to a licence to use the premises. Whether or not that result can be inferred must be a question of degree, but a Court is not justified in lightly inferring it.

*Breslin v. London and North Eastern Railway Co.* ([1936] S.C. (Ct. of Sess.) 816); *Robert Addie and Sons (Collieries) Ltd. v. Dumbreck* ([1929] A.C. 338) and *Edwards v. Railway Executive* ([1952] A.C. 737; [1952] 2 All E.R. 430) followed.

Where there is no express permission, and permission has to be inferred from evidence of user known to the defendant and not objected to by him, the matter is a question of fact for the jury; but whether there is evidence to justify a finding that permission was tacitly given is a matter of law.

Observations on the meaning of the term “allurement.”

*Hardy v. Central London Railway Co.* ([1920] 3 K.B. 459) followed.

ACTION by an infant (suing by his guardian ad litem) claiming damage on the ground of negligence.

The first defendant named in the writ was the Attorney-General, and the second defendant was Ryan, and the third defendant was the  
5 Hutt Valley Returned Services Association, Inc.

At the date of the accident which gave rise to this action, the plaintiff was a boy of fourteen years. He was injured whilst playing on a merry-go-round. This machine had been temporarily erected, on a vacant piece of land, for use during a Guy Fawkes carnival which was  
10 being conducted by the local Returned Services Association (hereinafter referred to, for the sake of brevity, as “the R.S.A.”) on Saturday, November 3, and Monday, November 5. The land was the property



of the Crown ; and it appeared that the intention was to set it aside for the purposes of a community centre, and that the control of it, as such, would ultimately be vested in the Lower Hutt City Council. At the time of the accident this intention had not been fully implemented, and the land was just a vacant section the ownership and control of which was then vested in the Crown, but with no person or authority taking any apparent active interest in its control. In these circumstances, it not unnaturally became the common resort of the children in the neighbourhood. It appeared also that some swings and see-saws had been erected on the land—though by whom and with what permission from the Crown was not proved. It was clear, however, that children had resorted to the land without protest from the Crown, and that the people in the neighbourhood in anticipation of probable future developments, had come to regard it as a community centre. Indeed, it was popularly known as the Taita Community Centre.

There was an allegation in the defence filed on behalf of the Crown that the land on which the merry-go-round was erected was let to one Jensen ; but this was not proved, and Jensen's name was not mentioned during the trial. The R.S.A., being desirous of raising funds, decided to hold a carnival there. They made some attempt, but without success, to find an authority who would sanction this use of the land and then decided to use it without permission. At no time has the Crown taken any objection to what was done by the R.S.A.

The Crown was originally made a defendant, and, in its statement of defence, it alleged that the plaintiff was a trespasser ; but it made no such charge against the R.S.A. When the case came on for hearing, by consent and at the request of all parties, the Attorney-General was dismissed from the suit.

No party left in the action was, therefore, in a position to say that any other party had no right to be on the vacant section. The evidence certainly did not establish that any party had an exclusive right of occupation of the whole of the vacant land ; and no attempt was made to set up any such exclusive right to the whole of the vacant land.

For the purposes of the carnival, the R.S.A. erected some tents on the land, and, in arrangement with the defendant Ryan, the merry-go-round, which belonged to him, was also erected there. These erections were made on the Saturday preceding the Sunday on which the accident occurred, and the carnival began on that Saturday afternoon or evening.

The merry-go-round and other games were in operation on the Saturday evening. The local populace attended the function and paid the fees demanded for the various attractions. After the entertainment finished on Saturday night, Ryan, or some other person, secured the merry-go-round by tying the brake in the "on" position and by fastening an iron bar through some wheels in the mechanism. The driving-belt was left in position, and, even without the brake and iron bar, it would have been difficult to rotate the machine by hand, as the compression of the engine would itself act as a brake.

The carnival was not in progress on the Sunday ; but members of the R.S.A. committee attended on the ground early on Sunday morning to do various jobs in preparation for the continuance of the carnival on the following Monday. Ryan also arrived on the ground on the Sunday morning, and he discovered that, during the night, some unauthorized person had cut the rope securing the brake of the merry-go-round, had removed the iron bar and had also cut the driving belt. In the result, it was quite an easy matter to rotate that part of the machine

to which the wooden horses were attached. Ryan re-secured the machine as best he could, but was unable to replace the driving belt. He left the grounds about lunch time. It appears that shortly afterwards the wire and rope with which he had secured the machine had again been cut, and during the afternoon the children in the locality were sitting on the wooden horses and pushing the machine round. They were at times ordered off the machine by members of the R.S.A. committee, but kept on returning to it. More will be said later on this aspect of the matter. Ryan was not on the ground during the Sunday afternoon and was not aware of the fact that the securing ropes and wires had again been cut. Plaintiff joined the group of children who were playing on the machine, and, in clambering over part of it, his foot was caught in the cogs of the crown-wheel and pinion when the machinery was put in motion by other children. He sustained the injuries in respect of which the present action was brought.

Ryan's connection with the matter ought now to be explained. He was the owner of the merry-go-round. He had on previous occasions assisted the R.S.A. with similar carnivals. On this occasion, he entered into a written agreement with the R.S.A. whereby he "agreed to supply a merry-go-round and three suitable games for the carnival and all proceeds from the said merry-go-round and games to be divided 60 per cent. to Ryan and 40 per cent. to the R.S.A." There were some other provisions in the agreement whereby the R.S.A. was to provide a ticket-seller and three pay clerks. The agreement was silent as to who was to operate the machine or provide the operator. Evidence was given as to who did in fact operate the machine on the Saturday night; and the jury seems to have taken the view that the merry-go-round and the land on which it stood was in the joint occupation of both Ryan and the R.S.A.; and that these two defendants were engaged in a joint adventure. (From that view, the learned trial Judge saw no reason to dissent.)

Plaintiff based his claim on two separate causes of action. In the first place, he claimed that the defendants were the occupiers of the machine; that he was either an invitee or a licensee thereon; and that the defendants had failed to fulfil the duty which they as occupiers owed to him. Alternatively, he claimed that, if the defendants were not occupiers of the machine, nevertheless they stood in such relationship to him that they owed him the duty which was described by Lord Atkin in *Donoghue v. Stevenson* ([1932] A.C. 562, 580), and that they had failed to discharge that duty.

Counsel were not in agreement as to the issues which should be put to the jury; but after the matter had been discussed in Chambers, the learned trial Judge drafted the issues set out below, and counsels' attitude to them as noted by him at the time were as follows:

Mr. ARNDT (for plaintiff) did not feel at liberty to agree to these issues, and submitted that the jury should be asked in respect of each defendant: Was that defendant guilty of negligence which caused the injuries complained of?

Mr. STACEY (for Ryan) agreed to the issues as drawn by me.

Mr. OAKLEY (for the R.S.A.) favoured issues as suggested by Mr. Arndt, but was not prepared to object to the issues as drawn by me.

All counsel agreed that His Honour should have power to determine any question of fact not covered by the findings of the jury. His Honour decided to put the issues as he had drafted them. The earlier questions had relation to the first cause of action, and the later questions

to the second cause of action. The issues and the answers thereto were as follows :

- (1) Did the plaintiff enter the premises within the ambit of the merry-go-round with the tacit permission of—  
 (a) the defendant Ryan ? *Answer* : No. 5  
 (b) the defendant R.S.A. ? *Answer* : Yes.
- (2) Were the said premises at the time of the accident occupied by—  
 (a) the defendant Ryan ? *Answer* : Yes.  
 (b) the defendant R.S.A. ? *Answer* : Yes.
- (3) Were the said premises at the time of the accident under the control of— 10  
 (a) the defendant Ryan ? *Answer* :  
 (b) the defendant R.S.A. ? *Answer* :
- (4) Did the condition of the crown wheel and pinion constitute, as regards the plaintiff, a concealed danger on the said premises ? *Answer* : Yes.
- (5) If there was such a concealed danger, was it known to— 15  
 (a) the defendant Ryan ? *Answer* : Yes.  
 (b) the defendant R.S.A. ? *Answer* : Yes.
- (6) If there was such a concealed danger, ought it to have been known to— 20  
 (a) the defendant Ryan ? *Answer* : Yes.  
 (b) the defendant R.S.A. ? *Answer* : Yes.
- (7) Were reasonable steps taken to safeguard the plaintiff against injury due to the setting in motion of the crown wheel and pinion ? *Answer* : No.
- (8) Were reasonable steps taken to lock or secure the mechanism against unauthorized operation of it ? *Answer* : Yes.
- (9) Ought the defendant Ryan to have foreseen the possibility of injury to such 25 a person as the plaintiff from the unauthorized setting of the gears in motion ? *Answer* : Yes.
- (10) If "Yes", did the defendant Ryan use ordinary skill and care to prevent such injury ? *Answer* : No.
- (11) Ought the defendant R.S.A. to have foreseen the possibility of injury to 30 such a person as the plaintiff from the unauthorized setting of the gears in motion ? *Answer* : Yes.
- (12) If "Yes", did the defendant R.S.A. use ordinary skill and care to prevent such injury ? *Answer* : No.
- (13) *Damages* :

					£	s.	d.
Special	..	..	..	..	37	19	6
General	..	..	..	..	450	0	0
<i>Total</i>	..	..	..	..	£487	19	6

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After the verdict was taken, the case was adjourned for further consideration under R. 286 (b) of the Code of Civil Procedure, and the jury was discharged.

Subsequently, a motion was filed on behalf of Ryan asking for an order directing that judgment be entered in his favour or alternatively 45 for a new trial on the grounds :

- (a) That the answers are so much in conflict as to necessitate a new trial,
- (b) That there ought to have been put to the jury an issue as to whether the plaintiff was a trespasser.
- (c) That the jury ought to have been directed that upon his own testimony the plaintiff was a trespasser on the merry-go-round,
- (d) That issues as to contributory negligence ought to have been put to the jury, and
- (e) That as against Ryan the verdict was against the weight of evidence. 55

Grounds (b) and (d) were abandoned, on its being pointed out that Ryan's counsel had agreed to the issues as already explained.

A motion was also filed on behalf of the R.S.A. asking—

- 5 (1) For judgment in favour of the R.S.A. on the grounds that there was no evidence on which the jury might properly find that the plaintiff entered the premises within the ambit of the merry-go-round with the tacit permission of the R.S.A. or alternatively that the answer of the jury to the first issue in respect of the R.S.A. was against the weight of evidence and upon the further ground that the remaining issues and the answers thereto do not disclose that the R.S.A. was in breach of any duties which it may have owed to the plaintiff.

- 10 (2) Alternatively for judgment of nonsuit (on similar grounds) and  
(3) Alternatively for a new trial (on similar grounds).

Both these motions came on for hearing on June 4, 1954; and, on the same date the plaintiff moved, orally, for judgment against both defendants.

*Arndt and O'Flynn*, for the plaintiff.

*Irvine*, for the first defendant.

*W. J. Stacey and Harding*, for the second defendant.

- 20 *Oakley and Curtin*, for the third defendant.

*Cur. adv. vult.*

- BARROWCLOUGH, C.J. [After stating the facts, as above:] Some explanation seems desirable of the wording of the first and second issues. The defendants were entitled to have an answer to the question as to whether the plaintiff was a trespasser. He did not become a trespasser, as regards the defendants at all events, merely by leaving the road and entering upon the land. All that was suggested was that he did become a trespasser when he entered on the small piece of land on which the merry-go-round was erected. As to that piece of land, and similarly as to the small pieces of land on which the tents were erected, the defendants (or at any rate the defendant R.S.A.) claimed that they were in exclusive occupation, and that the plaintiff had no right to enter thereon whilst they were in occupation. They had about £300 worth of goods stored in the tents, and the merry-go-round was also a valuable piece of machinery. The defendants had no more than a "squatter's right"; but, so far as the plaintiff was concerned, he did not seem to be in a position to dispute their title. Issues Nos. 1 and 2 were restricted, therefore, to the premises within the ambit of the merry-go-round. Issue No. 1 was modelled on the first question used in *Edwards v. Railway Executive* ([1952] A.C. 737, 741; [1952] 2 All E.R. 430, 433) and was restricted to an inquiry whether there was tacit permission, because there was no suggestion that the plaintiff had had express permission from anyone. It will be noted that the jury were unable to agree on the proper answer to issue No. 3.

- 45 I shall deal first with the R.S.A.'s submission that there was no evidence which could possibly justify an affirmative answer to Issue No. 1 (b). Just what is required, as a matter of law, to justify an inference of tacit permission to enter upon another person's premises has frequently been considered. The following passages from recent judgments of great authority all deal with this question in relation to infants who were said to have been licensees and are helpful and authoritative in the present case.

"In order to show that his son was in the station yard as a licensee "it is necessary for the pursuer to prove either that the station yard "was a place habitually, or at least frequently, resorted to by children "or by his son, and that this resort was in the knowledge of the defenders "or their servants and with their acquiescence." : *Breslin v. London and North Eastern Railway Co.* ([1936] S.C. (Ct. of Sess.) 816, 822). 5

"A licensee is a person whom the proprietor has not in any way "invited—he has no interest in his being there—but he has either "expressly permitted him to use his lands or knowledge of his presence "more or less habitual having been brought home to him, he has then "either accorded permission or shown no practical anxiety to stop "his further frequenting the lands. The trespasser is he who goes "on the land without invitation of any sort, and whose presence is "either unknown to the proprietor or, if known, is practically objected "to." : *Robert Addie and Sons (Collieries) Ltd. v. Dumbreck* ([1929] A.C. 358, 371). 10 15

"There must, I think, be such assent to the user relied upon as "amounts to a licence to use the premises. Whether that result can "be inferred or not must, of course, be a question of degree, but in my "view a Court is not justified in lightly inferring it" : *Edwards v. Railway Executive* ([1952] A.C. 737, 743 ; [1952] 2 All E.R. 430, 434). 20

Where there is no express permission and permission has to be inferred from evidence of user known to the defendant and not objected to by him, then the matter is a question of fact and for a jury ; but whether there is evidence to justify a finding that permission was tacitly given is a question of law. What then is the evidence in this case which would support an affirmative answer to Issue No. 1 (b) ? 25

The merry-go-round had been in position from late on the Saturday afternoon till the accident occurred at about 3 o'clock on the following Sunday. There was no evidence that any children had been on the merry-go-round on the Saturday except when the machine was under control and upon payment of a charge for the ride. There was evidence that children had been on the machine on the Sunday morning when it was not being officially operated. For a good part of the Sunday morning, the members of the committee were away from the scene gathering firewood ; but there is uncontradicted evidence that, whenever any member of the committee saw children on the machine on the Sunday morning, a vigorous protest was made. There was also uncontradicted evidence that, during the afternoon, when members of the committee saw the children on the machine, they ordered them off. Again it is true that for a period in the afternoon the members of the committee, or most of them, were away at a nearby hall, and that during that period no protests were made against the use of the machine. 30 35 40

The plaintiff swore that he first arrived on the road adjoining the ground at 2 p.m. He said he stayed there for about half-an-hour with his friend, Malcolm Macdonald. Throughout that time they both saw children playing on the merry-go-round without protest from anyone. Then, following an invitation from other children, they went to the machine. Malcolm Macdonald said that they waited on the roadside for about three-quarters of an hour ; but he fixes it at "over an hour, "I think". The plaintiff says the accident occurred at about 3 p.m. Accepting the story told by the plaintiff and his friend, it would appear that for the period from 2 p.m. to 3 p.m. or at most 3.30 p.m., children were playing on the merry-go-round without protest from the R.S.A. It is also clear, on the evidence of the plaintiff and his friend, that 45 50 55

during that time no members of the R.S.A. committee were to be seen. These two boys were emphatic that during this period no adults were in the vicinity of the machine. During that period, therefore, no members of the committee were shown to have been aware of the user of the machine and to have assented to such user. About these facts there is no room for doubt. The evidence was all one way; and it completely fails to establish that habitual or at least frequent resort with the knowledge of the defendants or their agents and with their acquiescence about which the *Lord Justice-Clerk* spoke in *Breslin v. London and North Eastern Railway Co.* ([1936] S.C. (Ct. of Sess.) 816, 822).

There was evidence, which no doubt the jury believed and which I must accept, that, during this period from 2 p.m. to 3 p.m. or shortly afterwards, there was no rope surrounding the machine; but, as to this, I quote from the judgment of *Lord Shaw of Dunfermline* in *Robert Addie and Sons (Collieries) Ltd. v. Dumbreck* ([1929] A.C. 358), He said: "The learned Lord President who gave judgment against the appellants admitted there was no duty to fence, but said that the fact that the owner allows the fence enclosing his private property to fall into more or less permanent disrepair has a certain evidential value on the question whether he consented to the use of his property. That, I think, is true, but by itself it cannot amount to a licence, and the best that can be urged in favour of the respondent is that the appellants were aware that the children disregarded the warnings which from time to time were given by the appellants' employees and continued to frequent the field" (*ibid.*, 379).

The present case is even stronger in that here there is no suggestion of a fence falling into more or less permanent disrepair. Failure to replace the rope which was doing duty as a fence is not the equivalent of allowing a fence to be in a state of more or less permanent disrepair. It is the equivalent of a very short state of disrepair and has little evidential value on the question whether there was consent to the use of the property. When it is coupled with the protests that were made in this case against such use of the property, no consent can possibly be inferred.

The position may be summed up as follows: There was evidence that for certain periods during morning and afternoon of that one day, children played on the merry-go-round without protest. There is no evidence that, whilst they were playing without protest, there was any member of the R.S.A. present and able to see them. There is evidence that, when the children played in the sight of members of the R.S.A., protests were made. The matters just mentioned certainly do not by themselves afford any evidence of tacit permission. I proceed to consider whether there were any other facts from which tacit permission could be inferred.

Counsel for the plaintiff submitted also that tacit permission might be inferred from the fact that the merry-go-round was an allurement to the plaintiff. The word "allurement" has been given a sanctity which I think it scarcely deserves. Its meaning has been variously interpreted. In one case it was described as a bait which cannot be resisted; in another as an irresistible magnet. Having regard to the age of the plaintiff (fourteen years), to the fact that he watched patiently from the roadside for half an hour, and to what he said under cross-examination by Mr. Stacey, it is difficult to assume that, to him, this merry-go-round was such a bait or such a magnet. That, however, was a matter for the jury; and I am prepared to accept that it was of opinion that it was an allurement or attraction to him. So was the

wheel to the injured child in *Robert Addie and Sons (Collieries), Ltd. v. Dumbreck* ([1929] A.C. 358), as to which Lord Hailsham, L.C., said :  
"It is found that the appellants warned children out of the field and  
"reproved adults who came there, and all that can be said is that these  
"warnings were frequently neglected and that there was a gap in the  
"hedge through which it was easy to pass on to the field. I cannot  
"regard the fact that the appellants did not effectively fence the field  
"or the fact that their warnings were frequently disregarded as sufficient  
"to justify an inference that they permitted the children to be on the  
"field, and, in the absence of such a permission, it is clear that the  
"respondent's child was merely a trespasser" (*ibid.*, 369, 370). In  
the same case, *Viscount Dunedin* protested against the suggestion,  
"that, unless a proprietor takes such measures as to effectively stop  
"trespass, the trespasser becomes a licensee" (*ibid.*, 372). He went  
on to say : "But when a proprietor protests and goes on protesting,  
"turning away people when he meets them, as he did here, and giving  
"no countenance in anything that he does to their presence there,  
"then I think no Court has a right to say that permission must be  
"implied" (*ibid.*, 372, 373). And later : "It is permission that must  
"be proved, not tolerance" (*ibid.*, 373).

In *Hardy v. Central London Railway Co.* ([1920] 3 K.B. 459),  
*Warrington, L.J.*, (as he then was) said : "Much stress was laid in  
"argument on the 'allurement' afforded by the moving staircase.  
"Such a fact may be a material element in considering whether under  
"all the circumstances leave and licence is to be inferred, but where,  
"as I think is the case here, leave and licence is distinctly negated,  
"the fact ceases to be relevant" (*ibid.*, 470). *Holdman v. Hamlyn*  
([1943] 1 K.B. 664 ; [1943] 2 All E.R. 137) is distinguishable because in  
that case the "allurement" was unaccompanied by acts distinctly  
negating the leave and licence or invitation. The allurement there-  
fore did not "cease to be relevant." It is also distinguishable on the  
same grounds as seem to me to distinguish *Gough v. National Coal*  
*Board* ([1954] 1 Q.B. 191 ; [1953] 2 All E.R. 1283). In the last  
mentioned case (as in *Holdman v. Hamlyn*) the infant plaintiff was  
clearly a licensee or invitee on the lands occupied by the defendant.  
That licence or invitation was admitted. The infant was said to be  
a trespasser only on that part of the machinery, on that land, which  
was an allurement. As to this, *Birkett, L.J.*, said that he thought the  
trial Judge correctly stated the law in the following passage : "If a  
"child is a licensee on the land [he was talking of the defendant's land]  
"the allurement which is on the land must be protected in some way,  
"and the boy does not become, for the purposes of this doctrine, a  
"trespasser as soon as he meddles with the very machine against which  
"he ought in fact to be protected."

In the present case, the land which the defendants occupied was  
merely the land upon which the machine was erected. There is no  
evidence whatever of an express invitation to any part of that land ;  
and the passage just quoted does not fit the facts of the present case.  
I think I ought to follow *Warrington, L.J.*, in *Hardy's* case ([1920]  
3 K.B. 459, 470), where the facts more closely resemble those with  
which I have to deal. It seems to me that, even allowing that in the  
case of this boy of fourteen the merry-go-round was an allurement,  
nevertheless that fact ceased to be relevant because not only was leave  
and licence not proved, but it was distinctly negated.

In the result, I have come to a very confident conclusion that no

twelve men could reasonably have held, on the evidence submitted in this case, that there was any tacit permission on the part of the R.S.A. to use the machine as it was used by the plaintiff and other children. It is possible that the jury confused permission with tolerance. In my opinion, there was not even a scintilla of evidence of permission; and I ought really to have directed the jury that there was no evidence at all to establish an affirmative answer to Issue No. 1 (b). It is not a case for ordering a new trial on this issue. The facts are all clear, and they do not as a matter of law warrant an affirmative answer. The jury by their verdict found, and I think quite properly found, that no tacit permission was given by Ryan. The plaintiff, therefore, has failed to prove that he had tacit permission from either defendant; and, if they are "occupiers," the plaintiff's case must fail: *Robert Addie and Sons (Collieries), Ltd. v. Dumbreck* ([1929] A.C. 358). The present case is even stronger in favour of the defendants than was the *Addie* case, because here it was not the defendants who put the machine in motion; but the playfellows of the injured boy.

It is now necessary to consider whether, in law, the defendants were occupiers of the land upon which the merry-go-round was erected. The jury, by its answer to Issue No. 2, has found that both defendants were occupiers. When the matter was before the jury, the contest was not so much a question as to whether the defendants were or were not occupiers, but rather a question as to which one of them was the occupier. The plaintiff submitted as his first cause of action, that both were occupiers, but, when the matter came before the Court again on motions for judgment, new trial, etc., the plaintiff argued that neither defendant was an occupier. He was justified in this course, because his alternative cause of action was based on the assumption that the defendants were not occupiers, and he relied on such cases as *Buckland v. Guildford Gas Light and Coke Co.* ([1949] 1 K.B. 410; [1948] 2 All E.R. 1086), and *Davis v. St. Mary's Demolition and Excavation Co. Ltd.* ([1954] 1 All E.R. 578). The plaintiff was no doubt influenced in this course by realization of the possibility of the Court's accepting the argument of the R.S.A. that there was no evidence to justify an affirmative answer to Issue No. 1 (b). However that may be, it becomes necessary to consider whether the defendants were occupiers.

As has already been observed, neither of these defendants had more than what I have called a squatter's right to be in occupation of the land within the ambit of the merry-go-round, but to quote *Roxburgh, J.*, in *Hartwell v. Grayson Rollo and Clover Docks Ltd.* ([1947] K.B. 901). (He in turn was quoting from *Salmond on Torts*, 10th Ed., 469): "The person responsible for the condition of the premises is he who is in actual possession of them for the time being, whether he is the owner or not, for it is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons" (*ibid.*, 917).

The jury was asked in Issue No. 3 to say who had control of the premises at the time of the accident; but, for some reason which was not disclosed, it found itself unable to give that answer. Accordingly, pursuant to the arrangement that I should find any necessary facts not covered by the answers of the jury, I have had to consider what is the proper answer to give to that question. My answer is that the control of the premises at the time of the accident was vested in Ryan and the R.S.A. jointly. These two defendants were therefore in actual possession of the premises, and they had the control of them. It makes no



difference that their possession was *de facto* rather than *de jure*. In the same case, *Buckmill, L.J.*, said: "I have not been able to find a 'definition of the word 'occupier' as used by *Willes, J.*, in the case of *'Indermaur v. Dames* (1866-7) L.R. 1 C.P. 274; L.R. 2 C.P. 311), 'but it seems to me that in order to be an occupier one must have 'possession of the premises and control over them' (*ibid.*, 915). I think, therefore, that the finding of the jury that both defendants were the occupiers of the premises cannot be challenged. 5

The defendants being occupiers, the case is distinguishable from *Davis v. St. Mary's Demolition and Excavation Co. Ltd.* ([1954] 1 All E.R. 578). As *Ormerod, J.*, stated in that case, if the defendants were occupiers and the plaintiff a trespasser, then in view of the decision in *Robert Addie and Sons (Collieries) Ltd. v. Dumbreck* ([1929] A.C. 358), the plaintiff had no cause of action, unless the case could be brought within the decisions in *Excelsior Wire Rope Co., Ltd. v. Callan* ([1930] A.C. 404) or *Mourton v. Poulter* ([1930] 2 K.B. 183), in each of which cases the defendants were found liable despite the fact that the plaintiff was a trespasser, because they had shown a reckless disregard of the presence of trespassing children. *Ormerod, J.*, does not expressly say so, but it is implicit in his judgment, that the defendants in the case he was considering were not regarded as occupiers. They had a right to go upon the premises only for the purpose of effecting their demolitions. The present case can be distinguished from *Excelsior Wire Rope Co., Ltd. v. Callan* ([1930] A.C. 404), in that it was the Wire Rope Company which put the machine in motion, and, in doing so, it acted "with reckless disregard of the presence of the trespasser". With the utmost respect, it seems to me that *Robert Addie and Sons (Collieries), Ltd. v. Dumbreck* ([1929] A.C. 358), might possibly have been decided the other way on that very ground; but, in this case, I repeat again that it was not the defendants who set the machine in motion; and it cannot be said that they acted with reckless disregard of the presence of the trespassing plaintiff. Similarly in *Mourton v. Poulter* ([1930] 2 K.B. 183) the defendants, and not a third party, felled the tree that caused the injury. *Buckland v. Guildford Gas Light and Coke Co.* ([1949] 1 K.B. 410; [1948] 2 All E.R. 1086) is also distinguishable on the same grounds. The Gas Company were not occupiers. It had merely an easement to carry their lines over the land. If it be necessary for me to decide as a question of fact whether or not the defendants in this case "acted with reckless disregard of the presence of the trespasser", I have no hesitation in finding that they did not so act. I think this case falls to be decided on exactly the same principles as were applied in *Robert Addie and Sons (Collieries), Ltd. v. Dumbreck* ([1929] A.C. 358). 30 35 40

It is a matter for some concern that apparently the standard of care required of an occupier is different from, and perhaps less than, the standard of care required of a person who is not an occupier. That differing standards do exist in English law is pointed out in an interesting series of articles in the *Law Quarterly Review* (69 L.Q.R. 182 and 359; and 70 L.Q.R. 33). The probable reasons for the two standards are pointed out in those articles, and it seems that, in America, an attempt has been made to restate the law on this topic. It may be that there is a case for amendment of the law in this country. I am concerned, however, with the law as it is and not with what it ought to be. In this case the defendants were rightly found to be occupiers of the land within the ambit of the merry-go-round. There is no evidence to 55

justify a finding that the plaintiff had any permission to go upon the merry-go-round as and when he did. He was, therefore, in the position of a trespasser; and the defendants have not been shown to have failed in any duty they owed to such a trespasser.

- 5 Judgment will be for each of the defendants with costs as per scale, and disbursements for fees of Court and witnesses expenses. The trial occupied three days, and two days were taken up with the motions for judgment, etc. I am prepared to certify in favour of each defendant for two extra days at fifteen guineas a day and I allow each of the de-  
10 fendants twenty guineas on the hearing of the motions.

*Judgment for the defendants.*

Solicitors for the plaintiff: *C. J. O'Regan and Arndt* (Wellington).

Solicitors for the first defendant: *Crown Law Office* (Wellington).

Solicitors for the second defendant: *W. J. and R. Stacey* (Wellington).

Solicitors for the third defendant: *Hogg, Gillespie, Carter, and Oakley* (Wellington).

### MOUAT v. ARCHER.

SUPREME COURT. Westport. 1954. June 30; October 27.  
F. B. ADAMS, J.

*Transport—Goods-service Licence—Contractor for Construction of Bridge Approach required to procure Spoil at His Own Expense, to carry it to Works Site and to place it in Position as directed—Spoil, in Transit, Contractor's Property, subject to Use as Specified—Contractor carrying his Own Goods and not "for hire or reward"—Contractor not Operating a "Goods-service"—Transport Act, 1949, ss. 2, 95 (1).*

In April, 1953, M., a general contractor for supply of sand and shingle, for opencast mining, road-making, and the like, entered into an arrangement with the Ministry of Works. The engineer's letter inviting him to tender, stipulated for the supply and delivery of 3,400 cubic yards of approved gravel fill for the approaches to an intended bridge, and for the placing of such filling in position in accordance with certain plans and as directed by the engineer. M.'s tender was for the price of £850 (a lump sum) though it was equivalent to 5s. per cubic yard; and subsequent letters made it clear that the measurement was to be "solid measurement," meaning that he was to do what was described as "compacting" the material, and the measurement was to be of the compacted quantity.

The contract required much more than the supply of the necessary spoil, which M. was obliged to procure at his own expense, and he was free to find it wherever he could; but it had to be approved as suitable. He began by purchasing the spoil privately. This material was declared unsuitable. Then, he arranged to procure other spoil from a road-side embankment, vested in the Crown, and the removal of which was thought desirable. This was four miles distant from the site of the bridge approach. He was not required to pay for the spoil; but he received no recompense for the longer haulage involved.

M. was convicted on a charge of operating an unlicensed goods-service in breach of s. 95 (1) of the Transport Act, 1949, the charge having arisen out of M.'s transporting a load of material from the embankment to the site of the bridge approach. M. appealed from that determination.

*Held*, allowing the appeal, 1. That the spoil while in transit from the embankment to the bridge site, was M.'s property, being the fruit of his labour, subject possibly to a right in the Crown to have it used on the construction to specifications of the bridge approach in the course of M.'s contractual duty.

*Gifford v. Yarborough* ((1828) 5 Bing. 163; 130 E.R. 1023), referred to.

2. That M. was not carrying the goods "for hire or reward", but for the purpose of performing a specialized contract, and the reward he was to get was for performing the contract rather than for the carriage of the spoil; and, consequently, he was not operating a "goods-service" as defined by s. 2 of the Transport Act, 1949.

*Gill v. Laird* ([1940] N.Z.L.R. 540; [1940] G.L.R. 321) and *Cowie v. Carruth* ([1940] N.Z.L.R. 687) distinguished.

*Semble*, 1. That there may be carriage for reward, even though the reward covers something more than carriage; but it does not follow that there is necessarily a carriage for reward in every case where reward is given for something which includes carriage; the matter does not depend on a mere arithmetical computation of the value of the carriage in comparison with other values given.

2. That the question in each case must be, to some extent at least, one as to substance or degree; and, here, the substance of the contract was the construction of a bridge approach, the carriage of spoil being incidental thereto.

APPEAL against a conviction entered at Westport on a charge of carrying on an unlicensed goods-service in breach of s. 95 (1) of the Transport Act, 1949. No penalty was imposed; but appellants desired to establish his right to do what he did. The appeal was a general appeal; and the evidence was much fuller than was placed before the learned Magistrate. In particular, he had no documentary evidence before him.

The facts sufficiently appear from the judgment.

*Craig*, for the appellants.

*Kitchingham*, for the respondent.

*Cur. adv. vult.*

F. B. ADAMS, J. In April, 1953, the appellant, who describes himself as a general contractor for supply of sand and shingle, for opencast mining, road-making and the like, entered into an arrangement with the Ministry of Works. The engineer's letter inviting him to tender, stipulated for the supply and delivery of 3,400 cubic yards of approved gravel fill for the approaches to an intended bridge, and for the placing of such filling in position, in accordance with certain plans and as directed by the engineer. Appellant's tender was for the price of £850—a lump sum, though equivalent to 5s. per cubic yard—and subsequent letters made it clear that the measurement was to be by "solid" measurement meaning that appellant was to do what is described as "compacting" the material, and the measurement was to be of the compacted quantity. Shortly after the exchange of the letters, there was executed a series of five separate contracts between appellant and the Ministry, each of which was for a sum of £170 and purported to be for cartage of 680 cubic yards of material at 5s. per yard. The wording of these documents was quite inappropriate as an expression of the real terms of the arrangement into which appellant had entered, and the evidence satisfies me that they were mere *pro forma* documents, executed for departmental reasons, and intended to implement, but not to displace, the pre-existing arrangement. No question arises as to the contractual validity of that arrangement. It has been duly performed, and its only importance here is to define what appellant had undertaken to do and was in fact doing at the relevant time.

The contract required much more than the supply of the necessary spoil. The material had to be built into an embankment of a certain size and shape. It had to be spread in layers of a certain thickness; and, to use the words of the Department's engineer, called as a witness for the prosecution, had to be spread to grade with specified batters,

and made into a finished job. According to appellant, he had also to do some considerable preliminary work in clearing the site of obstructions, such as pine trees. In my opinion, the contract was in reality, one for the construction to specifications, of a bridge approach. This was the view both of appellant and of the engineer, and appellant had to use, not only his vehicles and the necessary equipment for the severance and loading of the spoil but also a bulldozer which he kept constantly on the site. The work was done under regular supervision on behalf of the Department.

- 10 In regard to the spoil, it is clear that the obligation of procuring it, at his own expense, rested on appellant, and that he was free to find it wherever he could. But it had to be approved as suitable. Appellant began by purchasing spoil privately at a distance of a mile and a half from the site. When this material was declared unsuitable, he arranged to procure other spoil from a man named Godling. It was necessary to supplement this, and a conversation took place between appellant and the engineer, and the latter decided, to use his own phrase, "to kill two birds with one stone", by allowing appellant to use a certain roadside embankment, which was vested in the Crown, the removal of which was thought desirable. This embankment was about four miles away from the site of the bridge approach. Appellant was not required to pay for the spoil, and he received no recompense for the longer haulage involved. Appellant cut into and removed this embankment over a length of three chains and to a width of some feet, taking a considerable quantity of material, and using mechanical equipment for the purpose of severing and loading it into his lorries. When this material was in its turn condemned as unsuitable, appellant was required to, and did, "tidy up the job", by removing for a distance of about ten chains along the road, and dumping as directed, so much of the severed material as he had not already removed. One may perhaps be thankful that it is unnecessary to consider whether he needed a licence for the carriage of the spoil so dumped, or to consider other similar questions which were mooted in the argument.

The present charge arose out of the transporting of a load of material from this embankment to the site of the bridge approach. The other charge, heard with this one, arose in respect of a load transported on the same day from Godling's property. The learned Magistrate dismissed that charge on the ground that appellant was the owner of the load, but convicted on this because appellant was not shown to be the owner.

- By s. 2 of the Transport Act, 1949, the word "goods" is defined as meaning "all kinds of movable personal property, including animals and mails". I am unable to accept the argument that the spoil that was carried by appellant on this occasion was not "goods"; *Northam v. Bowden* ((1855) 11 Ex. 70; 156 E.R. 749). It had been lawfully reduced into possession by severance from the realty, and was not, as was suggested, useless and valueless. By the application of labour and equipment, appellant had given it a value—if not a mercantile value, at least a value in his own hands as a means to the performance of the obligation he had undertaken.

The relevant portion of the definition of "goods-service", as contained in s. 2 of the Transport Act, 1949, is as follows:

- "Goods-service" means the carriage or haulage of goods for hire or reward by means of a motor-vehicle . . . but, subject to the provisions of sections ninety-six and ninety-eight of this Act, does not include the carriage or haulage of goods by the owner thereof (whether for hire or reward or not) by means of a motor-vehicle.

Sections 96 and 98 do not apply ; and it is, therefore, as the learned Crown Prosecutor agreed, a good defence if it be shown that appellant was carrying his own goods. The altered wording of the definition distinguishes the case on this point from *Gill v. Laird* ([1940] N.Z.L.R. 540 ; [1940] G.L.R. 321) and *Cowie v. Carruth* ([1940] N.Z.L.R. 667). 5

It was argued that the statute was never intended to apply to such a case as this. But the argument was not founded on anything in the statute ; and the intention of the Legislature must be gathered from its words, and may not be the subject of mere speculation. Extreme cases were suggested leading, it was said, to absurd results ; but I do not find it necessary to consider them. 10

There remain to be considered two other arguments : (1) that appellant was the owner of the spoil, and (2) that, in any event, there was no carriage for " hire or reward ".

As to the first, the problem is a neat one. Until severed, the spoil 15 was Crown land ; and it was destined, at the end of its journey, to become Crown land again in pursuance of a contract to which the Crown was a party. On the other hand, it became a chattel by the labour of appellant's servants and the use of his equipment. He was free to take it or not as he chose, and he took it for the purpose of performing the personal obligation of procuring spoil which was imposed upon him by the contract. The Crown was not directly interested either in its procurement or in its transport ; and it may perhaps be a crucial point that the Crown might have rejected it as unsuitable when it arrived at the bridge site. I see no reason to think that the Crown had 20 even momentarily surrendered this right of rejection. 25

It seems to me that the ownership must depend on the intention of the parties, and if no intention was expressed the intention must be inferred from the circumstances. Appellant's version of his conversation with the engineer was that the latter said : 30

The material has to be shifted from the side of the road, and you can have that if it is any use to you.

When words to that effect were put to the engineer in cross-examination, he agreed that they were " more or less correct ", offered no criticism, and did not suggest any more correct alternative. When asked in re- 35 examination whether the permission extended to the use of the spoil on any other job, he replied in the negative ; but I understood this as being, either a negation that any such thing was said, or his inference only and not a report of anything alleged to have been said.

The spoil was, I think, either the property of the Crown subject to a licence entitling appellant to use it on this job, or the property of appellant, subject possibly to a right in the Crown to have it so used. On the best consideration I can give to it, I think the latter is the proper inference and the one more likely to accord with the true intention. It was appellant who turned the spoil into a chattel possessing a value, 40 and its value lay in the use to which it could be put in his hands in the performance of his contractual duty. In the opinion of the Judges delivered by *Best, C.J.*, to the House of Lords in *Gifford v. Yarborough* ( (1828) 5 Bing, 163 ; 130 E.R. 1023) the following words were used with reference to a parcel of land formed by gradual alluvion from the sea : " The original deposit constitutes not a tenth part of its value, 45 " the other nine-tenths are created by the labour of the person who has " occupied it ; and, in the words of Locke, the fruits of his labour cannot, " without injury, be taken from him " (*ibid.*, 166 ; 1024). Without suggesting that those words are directly in point, the spoil here in 55

question was the fruit of the appellant's labour, and it seems more appropriate to hold that it was his.

On this view, it is unnecessary to decide the other point; but, rather than allow my decision to rest on a ground which may seem uncertain, I feel that I should express my opinion upon the second point also.

- In *Gill v. Laird* ([1940] N.Z.L.R. 540; [1940] G.L.R. 321) there was a contract with the Public Works Department to deliver spoil at 4s. 6d. a yard to fill an excavation in a road caused by the flooding of a river. The contractor bought the spoil at 4d. a yard. There is nothing in the report to suggest the existence of any duty to do anything with the spoil but dump it into the excavation. The fact that the spoil belonged to the contractor was at that date no defence, and *Smith, J.*, held that there had been a carriage for "hire or reward". It made no difference that the payment also embraced the cost of procuring the spoil. The decision was followed on this point by *Kennedy, J.*, in *Cowie v. Carruth* ([1940] N.Z.L.R. 667). The facts are not fully stated, but I knew them once as counsel in the case. The respondent was in the habit of supplying lime to farmers, he ordering the lime, taking delivery of it at the railway station, and then delivering it to farmers. In *Chalmers and Dixon on the Road Traffic Laws of New Zealand*, 2nd Ed., p. 107, it is said that he also spread the lime. In contract with *Gill v. Laird* ([1940] N.Z.L.R. 540; [1940] G.L.R. 321), where the cost of carriage was clearly a major factor, the cost of transporting the lime from the railway would be only a small fraction of the total charge. The learned Judge left it to the Magistrate to decide, as a question of fact, whether the lime was carried for a reward payable by the farmer; and said that the conclusion would be more readily reached if part of the charge was distinctly referable to the carriage, or if the price varied according to the extent of the carriage. There was thus no decision on the facts.

- Those two cases make it clear that there may be carriage for reward even though the reward covers something more than the carriage. But it does not follow, and those cases do not decide, or suggest, that there is necessarily a carriage for reward in every case where reward is given for something which includes carriage. In *Coddington v. Clausen's Ltd.* ([1941] N.Z.L.G.R. 111, 114), *Northcroft, J.*, took the view that *Gill v. Laird* ([1940] N.Z.L.R. 540; [1940] G.L.R. 321) was decided upon its own facts, and was not to be treated as laying down a general proposition which would mean that every merchant who delivers the goods he sells carries them for "hire or reward". This is equally true in regard to *Cowie v. Carruth* ([1940] N.Z.L.R. 667) subject to the reservation that there was in that case no decision on the facts. The builder of a house who uses his own vehicles must exact a price which covers their use; but it would be absurd to say that, in carrying materials to the site for use on the property, he is carrying them for "hire or reward". That is an extreme case, and others may easily be imagined. In my opinion, the matter does not depend on a mere arithmetical computation of the value of the carriage in comparison with other values given. There may be cases of carriage for reward where the cost attributable to the carriage is comparatively small, and cases which are not to be described as cases of carriage for reward although the value of the carriage bulks largely in the total price. I think the question must be, to some extent at least, one as to substance or degree, and must depend very much on the nature of the contract; and, in the present case, it seems to me that the sub-

stance of the contract was the construction of a bridge approach, the carriage of the spoil being incidental thereto. I think this must be so, even though the greater part of the price may have been attributable to carriage—a matter on which I can only speculate, having no evidence on the point. It may well be that the cost of severing and loading the spoil, and of unloading it and forming and compacting the approach, including the provision of the equipment necessary for those purposes, was much in excess of the cost of moving it in vehicles over the roads. But I do not proceed on suppositions of that kind so much as on a general view of the nature of the transaction, taking into account particularly the fact that the carriage was only one part of the necessary series of operations. There is also the fact, for what it may be worth, that the payment was not directly measured by the length of the carriage. The varying distances did not affect the contract price. The fact that the *pro forma* contracts specified a price per yard can make no difference, the price being admittedly payable, not in respect of yardage delivered to the site, but in respect of compacted yardage. I have already given my reasons for disregarding the formal wording of those contracts. They purport to be “cartage contracts,” but are not in fact, and were not intended as, accurate or complete records of the contract.

Viewing the matter broadly, I think that appellant was not carrying for “hire or reward”, but was carrying for the purpose of performing a specialized contract; and the reward he was to get was for performing the contract rather than for the carriage of the spoil. He was indeed under no obligation to carry it in his own vehicles, having full freedom as to the modes of procuring and carrying the spoil, provided only that in one way or another he performed his contract.

I have not overlooked the presumptions created by s. 157 (a) and (c) of the Act; but it seems to me that they are irrelevant where, as here, the primary facts are clearly ascertained and all that remains is either to apply the law or to draw from the primary facts inferences which can be arrived at with reasonable assurance. In this case I am “satisfied” as required by s. 157 (a), and hold that “the contrary is proved” within the meaning of s. 157 (c).

The appeal is accordingly allowed and the conviction quashed. Following the usual rule in cases of successful appeals against convictions in prosecutions instituted by public prosecuting authorities, no costs are allowed.

*Appeal allowed.*

Solicitors for the appellant: *A. A. Craig*, (Westport).

Solicitors for the respondent: *Guinness and Kitchingham* (Grey-mouth).

IDEAL LAUNDRY, LIMITED *v.* PETONE BOROUGH.

SUPREME COURT. Wellington. 1954. September 3, 6; December 8.  
TURNER, J.

*Town and Country Planning—Statute a Code in Itself—Test of Reasonableness, as applied to By-law, inapplicable to Town-planning Scheme—Application of Test of Ultra Vires to Scheme—Town-planning Act, 1926, s. 21—Town and Country Planning Act, 1953, s. 23.*

The Town and Country Planning Act, 1953, is a code in itself containing the whole of the law applicable to the formulation, approval, and operative effect of town-planning schemes; and, before the passing of that statute, the same conclusion applied to the Town-planning Act, 1926.

A town-planning scheme is not a by-law, in the sense in which that term is generally understood—*cf.*, as defined in the By-Laws Act, 1910; and, consequently, the test of reasonableness, as applied to a by-law by the Courts, has no place in the consideration of the validity of a town-planning scheme formulated under the Town-planning Act, 1926, or under the Town and Country Planning Act, 1953.

*Taylor v. Brighton Corporation* ([1947] K.B. 736; [1947] 1 All E.R. 864) applied.

*Kruse v. Johnson* ([1898] 2 Q.B. 91) and *McCarthy v. Madden* (1914) 33 N.Z.L.R. 1251 mentioned.

A town-planning scheme must depend upon the statute alone; and this involves a consideration whether or not it is *ultra vires*.

Certain specific provisions in the parts of a scheme, clearly severable from the rest, may be *ultra vires*, leaving a substantial residue as a good and valid scheme, so that such defects as it may show when examined in detail do not invalidate the scheme as a whole.

- MOTION for a declaration that the town-planning scheme of the defendant, approved by the Town Planning Board on July 6, 1953, was invalid; and for an order directing the issue of a mandamus commanding the defendant to grant to the plaintiff a permit for the erection of a  
5 proposed building and to allow the plaintiff to use it for the purposes of its business as a laundry, and alternatively, a declaration that the plaintiff was entitled to erect the proposed building and make use of it for the purpose of the plaintiff's business of a laundry or for any other  
10 purposes not forbidden by statute, by statutory regulation, or by the common law.

The facts sufficiently appear from the judgment.

*Harding and Bryan*, for the plaintiff.

*Cleary and Coles*, for the defendant.

*Cur. adv. vult.*

- 15 TURNER, J. In this action the facts are not in dispute. The material allegations of the amended statement of claim were admitted, and, after a small amount of formal evidence had been called and some documents put in by consent, the matter proceeded as a *Banco* argument. I will briefly set out the admitted or proved facts.  
20 Plaintiff is a duly incorporated company having its registered office in the Borough of Petone and there carrying on the business of a laundry in premises having frontages to Aurora Street and The Esplanade. The business is an old-established one. The defendant's Council



prepared a town-planning scheme pursuant to the provisions of the Town-planning Act, 1926 (now repealed and merged in the Town and Country Planning Act, 1953). This scheme was finally approved by the Town-planning Board pursuant to s. 21 of the 1926 Act on July 8, 1953.

In the scheme, the area in which plaintiff company's premises are situated is designated a general residential district. By para. 26 of the scheme, it is provided that, in a general residential district, land and buildings may be used for certain purposes only; and it is common ground that the business of plaintiff company is not one of the permitted uses. At the requisite stage of the preparation of the defendant's scheme—namely, after the preparation of a provisional scheme and before its final approval—the plaintiff company made objection in due form on two separate occasions to its land being included in a general residential district.

The first objection was apparently lodged after the first public notification of the scheme, following on its original provisional approval by the Board under s. 17 of the old Act; this objection was lodged in February 1951, was heard before a committee of the Board in August of the same year, and was dismissed on its merits. The second objection was apparently lodged in opposition to the scheme as finally amended. This objection (which was formally presented but not supported by any fresh argument) was dismissed by the Board on the recommendation of a similar committee in or about April 1953.

Subsequently to the passing of the Town and Country Planning Act, 1953, public notification of the scheme was duly given by defendant Council under s. 19 (2) (b) of that Act. The plaintiff company is, therefore, on the admitted facts, the owner of non-conforming premises in a general residential area. It has for some time been anxious to extend its premises, or, perhaps it is more appropriate in these proceedings to say, at least to re-arrange them so as to allow for additional staff accommodation and amenities and some re-arrangement of the business part. On October 7, 1953, it applied to defendant for a permit to erect a new building on its land in accordance with the plans now produced to the Court. It is admitted that this application complied with all the requirements of defendant's Council for a building permit, save and except one—namely, that the proposed new building would be one which would not conform (as to user) to the town-planning scheme. The permit was refused, and is still refused, by the defendant's Council.

In these circumstances, the plaintiff company prays for a declaration that the town-planning scheme is invalid, and for a writ of mandamus directing the issue of a building permit, or, alternatively, a declaration that plaintiff company is entitled to erect the proposed building.

As the prayers for mandamus and for a declaration as to plaintiff company's rights appear to me to be dependent, at least on the course of the argument as presented to me, upon the validity of the town-planning scheme, I shall direct my attention immediately to considering Mr. *Harding's* submissions that the scheme is invalid. Summarized, these may be shortly put as follows. The scheme is a by-law. It is attacked (a) as unreasonable; (b) as *ultra vires*; (c) as uncertain; (d) as including a dispensing power in special cases; (e) as reserving certain matters for future decision. Alternatively, if it is not a by-law, it is contended that it must be subject to the control of the Court in the same way, and upon the same principles, as a by-law.

On the first part of Mr. *Harding's* argument, I will say at once that

I am of opinion that the scheme is not a by-law in the sense in which that term is usually understood—e.g., as defined in the By-Laws Act, 1910, or as used in the cases frequently cited on questions of reasonableness, such as *Kruse v. Johnson* ([1898] 2 Q.B. 91), or *McCarthy v. Madden* ([1914] 33 N.Z.L.R. 1251). I do not find such authorities of any great use in considering this matter, and have concluded that the Town and Country Planning Act, 1953, is a code in itself containing the whole of the law applicable to the formulation, approval, and operative effect of town-planning schemes; and that the same conclusion applied to the Town-planning Act, 1926, before the passing of the Town and Country Planning Act, 1953. The procedure laid down by these Acts is quite different from that necessary for the formulation of by-laws proper. Under the Town-planning Act, 1926, the Act under which the scheme now under consideration was formulated, the local authority had the initial responsibility of formulating a provisional scheme. It was then considered and revised by the Town-planning Board. After this, it was advertised, and all persons concerned had then the opportunity of making objection and being heard before a committee of the Board. Only after this committee had reported back to the Board and its report had been considered was the scheme finally approved. This procedure leaves me in no doubt that the test of reasonableness, as applied to a by-law by the Courts, has no place in the consideration of the validity of a town-planning scheme formulated under the Town-planning Act, 1926. The Board may be taken to have been entrusted by the Legislature with the duty of ensuring reasonableness; and, if it fails in this task, the Court, I think, cannot intervene, as long at least as it is shown that the Board has done its duty in considering and revising the scheme and in hearing and considering objections. This was held to be the position in England in legislation not dissimilar in purpose in *Taylor v. Brighton Corporation* ([1947] K.B. 736, 748; [1947] 1 All E.R. 864, 869, 870). It is true that the procedure for the establishment of a scheme under the English statute is entirely different from that prescribed by the New Zealand legislation; but, in both cases, it is equally true that the subject-matter of town-planning schemes is totally different from that of the generality of by-laws.

This being my conclusion, I put on one side, as being inapplicable to town-planning schemes, those parts of Mr. *Harding's* argument in which he submits that the scheme or parts of it are unreasonable. I am willing to examine his argument as to *ultra vires*, however, for the conclusion to which I have come—namely, that the scheme must depend upon the statute, and upon the statute alone—involves the consequence that, if it is not a scheme authorized by the statute, it cannot be valid. In so far, therefore, as Mr. *Harding's* argument as to certainty, dispensing powers, or reservation of matters for future decision is included in his argument as to *ultra vires*, I can consider these matters; but not otherwise.

In support of his submission that the scheme was *ultra vires* of the statute, Mr. *Harding* put forward some arresting illustrations. He argued, for instance, that para. 6 (2) (which purports to give to the Engineer or his nominee free access to all lands and buildings at all reasonable times for the purpose of ascertaining whether the provisions of the scheme are being complied with) is not within the express or implied authority of the statute; and that the whole of Part IV (which purports to set up a tribunal of appeal) is similarly unauthorized. I do not propose to decide on the merits of this argument. It may be

—I do not so decide—that some of the passages in the scheme put forward by Mr. *Harding* as examples of *ultra vires* provisions are in fact unauthorized by the statute : what I have to decide, however, is whether, even if this be the case, these passages invalidate the whole scheme. I have come to the conclusion that they do not, and I will state my reasons for this view. 5

The parts of the scheme which are vital to plaintiff company's application for a building permit are Part II (paras. 5 to 20, inclusive), Part III (particularly paras. 21, 22, 23 and 26), and those parts of Part I (definitions, etc.) which apply to the paragraphs I have mentioned. 10 These parts of the scheme divide the Borough into areas, and then constitute the particular area in which plaintiff company carries on business as a general residential district, and prescribe what uses are, and are not, permitted in such a district ; they also govern the issue of building permits in respect of extensions in cases like the present one. 15 None of these parts of the scheme is substantially affected by any of Mr. *Harding's* submissions as to *ultra vires*. It is true that certain specific provisions in the parts of the scheme which I have mentioned—clearly severable from the rest—may be affected by the submissions. An illustration is to be found in para. 6 (2)—the provision to which I have already made reference—which purports to empower the Engineer or his nominee to enter at all reasonable times to inspect. Even assuming, however, the full validity of Mr. *Harding's* submissions as to *ultra vires* as to this provision (which I do not decide) I must still conclude 20 that it could be severed from the rest, leaving a good scheme behind. I was invited by Mr. *Harding* to refuse to sever, as (he said) it could not be decided with certainty whether the Board would have approved the residue of the scheme after severance. I do not think, however, that I should apply so exacting a test. I think it is sufficient to ask myself whether, if the portions objected to are excised, the remainder is a scheme in any substantial sense different in effect from the original whole. I do not find any substantial difference effected to the essentials of the scheme by the excision of any parts objected to by Mr. *Harding* ; and, in particular, I do not find the parts of the scheme which are relevant to this application to be affected in any substantial degree. 25 30 35

This being so, I conclude that any finding of *ultra vires* to which I might be persuaded by considering Mr. *Harding's* submissions in detail would result at most in an excision of some details which would still leave, as good, a substantial residue, not essentially different from the scheme as now propounded, and sufficient to warrant the Council's refusal of a building permit to plaintiff company. It is not necessary for me to decide in those circumstances on the validity of each part of the scheme. I merely decide that such defects as it may show when examined in detail do not invalidate the scheme as a whole, and will not result in those parts of it which affect the present proceedings being set aside. 40 45

The result is that the relief prayed by plaintiff must be refused. The defendant Borough must have the costs of the application, which I fix as on an action for £500, together with disbursements, and with an allowance for counsel for second and third days at twenty guineas per day. I reserve the question of costs of second counsel. If any further certificates are required, I reserve leave to counsel to apply. 50

*Order accordingly.*

Solicitors for the plaintiff : *Webb, Richmond, and Bryan* (Wellington).  
Solicitors for the defendant : *Phillips, Hollings, and Shayle-George* (Wellington).

[IN THE SUPREME COURT AND IN THE COURT OF APPEAL.]

## WORKERS' COMPENSATION BOARD v. MARAKI.

SUPREME COURT. Gisborne. 1954. May 18, 19, 26; June 8.  
HAY, J.COURT OF APPEAL. Wellington. 1954. September 16; October 15.  
BARROWCLOUGH, C.J.; STANTON, J.; MCGREGOR, J.*Workers' Compensation—Statutory Indemnity of Uninsured Employers—Any Statutory Extension of Scope of Employment Extending Area of Obligation of Workers' Compensation Board in Respect of Workers' Compensation Claims and at Common Law—Workers' Compensation Amendment Act, 1950, s. 9.*

Any extension of the scope of the employment of a worker (as by s. 45 of the Workers' Compensation Amendment Act, 1947) extends the area of the obligation of the Workers' Compensation Board under s. 9 of the Workers' Compensation Amendment Act, 1950, in respect of judgments which workers might obtain against their employers for compensation under the Workers' Compensation Act, 1922, and also in respect of judgments for damages under the other statutes named in s. 9 and at common law.

*James v. Williams* ([1951] N.Z.L.R. 290; [1951] G.L.R. 152) approved.

*So held* by the Court of Appeal, dismissing an appeal from the judgment of *Haji, J.* (post, p. 399).

ACTION, tried before Mr. Justice Hay and a common jury, in which the plaintiff claimed damages from the defendant in respect of personal injuries suffered by the plaintiff and alleged by him to have been sustained through the negligence of a servant of the defendant in the driving of a motor-truck.

- At the time of the accident, the defendant was a shearing-contractor and the plaintiff was a member of one of the shearing gangs employed by him. On November 2, 1951, the gang of which the plaintiff was a member, and which was then working at the Wairongomai Station, ceased work for the week-end by reason of the wet conditions prevailing. The members of the gang decided to return to their homes at Waipiro Bay, a distance of about 24 miles. Most of them travelled in a light truck which was owned by the defendant, and which was in charge of and driven by one Hans Jahnke, an employee of the defendant and a member of the shearing gang. During the journey, the truck made a detour from the main road into the town of Ruatoria and remained there for some hours whilst the members of the gang indulged in a drinking bout at the hotel. On the resumption of the journey in the afternoon, and after the truck had regained the main road, the truck was stopped in order to retrieve the plaintiff's hat which had blown off. The plaintiff, unknown to the driver, alighted from the back of the truck; but, instead of proceeding to recover his hat, he stood on the road at the back of the truck and proceeded to satisfy a demand of nature. Whilst he was so engaged, or immediately thereafter, the driver commenced to back the truck along the road towards the hat, with the result that the plaintiff was carried underneath the truck, which did not stop until it became apparent that the plaintiff was lying on the road ahead of the truck.

- There was a conflict of evidence as to how the accident actually occurred. The plaintiff himself said that he was standing on the road

facing away from the truck when it moved and knocked him down. It was, however, stated by one of the women members of the gang, who was sitting on the tray of the truck, that the plaintiff (who had elected not to go for his hat) was endeavouring to clamber back on to the truck when he either slipped or was precipitated to the ground by the movement of the truck, which commenced to move just at the moment the plaintiff was endeavouring to board it.

The plaintiff's injuries were principally a broken arm and a broken leg, and his claim was for special damages £176 10s. 6d. and general damages £2,000. The first cause of action was that his injuries were caused by an accident in the course of his employment with the defendant as a result of the negligence of the driver. As an alternative cause of action, he alleged that the means of transport used by the shearing gang at the time of the accident was provided by the defendant under an agreement with the shearing gang to provide suitable means of transport for the gang at proper times from their homes to the places of employment prescribed by the defendant, and for their return from such places of employment to their homes; and that the defendant failed to provide a reasonably safe means of transport in that the driver of the motor-truck was not at the time of the accident a fit and proper person to be in control of a motor-vehicle.

On issues submitted to the jury, it was found, *inter alia*, that at the time of the accident the driver was in the course of his employment by the defendant, but that there was no agreement between the plaintiff and the defendant whereby the defendant was to supply suitable means of transport for the plaintiff to and from his home. The jury also found that it was reasonably necessary for the plaintiff to use the truck on his homeward journey, but negatived the allegation that the truck was being driven when the driver knew or ought to have known that he was not in a fit condition to control the truck, as well as the further allegation that the driver failed to exercise a proper control of the vehicle at the time of the accident. The jury, however, found the driver negligent in failing to keep a proper look-out; and it also found the plaintiff negligent in not warning the driver that he was alighting and was standing at the back of the truck. The jury found further that the effective cause of the accident was the combined negligence of both the driver and the plaintiff. The damages were assessed at a total of £2,170 10s. 6d. of which 50 per cent. was to be borne by the plaintiff himself as his share in the responsibility for the damage.

At the conclusion of the plaintiff's case, application was made to the learned trial Judge by counsel for the defendant to withdraw the case from the jury on the ground that there was no evidence on which the jury could reasonably find negligence on the part of the driver. His Honour refused the application at that stage, but reserved leave to the defendant to move in that direction after the issues had been dealt with by the jury. After the verdict, the case was adjourned for further consideration. On May 26, the matter came before His Honour again on a motion filed by the defendant for judgment in his favour; in the alternative, for a judgment of non-suit pursuant to leave reserved; and, in the further alternative, for a new trial. The grounds in support of the motion were, first, that the verdict was against the weight of evidence; and, secondly, that there was no evidence to go to the jury of negligence on the part of the defendant, as alleged in the statement of claim. After hearing argument on the motion, it was dismissed; and judgment was entered in favour of the plaintiff pursuant to the verdict of the jury.

After the issue of the writ, the Workers' Compensation Board (constituted under the Workers' Compensation Amendment Act, 1950) was, on the application of the defendant, made a third party to the proceedings by reason of the fact that the defendant had made default in insuring against his liability and the Board, by virtue of s. 20 of that Act, had become the insurer.

Upon the issue of the third-party notice, the Board filed a statement of defence disputing the plaintiff's claim against the defendant upon grounds similar to those relied upon by the defendant himself, and also disputing the defendant's right to be indemnified by the Board against any liability in respect of the matters set out in the plaintiff's statement of claim. No application was made to the Court under R. 99g of the Code of Civil Procedure for directions as to the mode of having determined the matters put in issue in the third-party notice. Before the trial commenced, however, counsel representing all parties saw His Honour in Chambers when the issues to be submitted to the jury were settled, and it was agreed that, upon the decision of the action as between the plaintiff and the defendant, the Court should proceed to determine the issue as between the defendant and the third party, for which purpose the Court should have power to determine any question of fact not covered by the findings of the jury.

After having disposed of the defendant's motion for judgment nonsuit or a new trial, the Court at once proceeded to hear argument on the question of indemnity.

*Thorp*, for the plaintiff.

*K. G. Scott*, for the defendant.

*Burnard and Bull*, for the third party.

*Cur. adv. vult.*

HAY, J. [After stating the facts as above:] It was submitted by Mr. *Burnard* for the third party that two main questions were involved, the first whether the defendant had brought himself within s. 45 of the Workers' Compensation Amendment Act, 1947, and the second whether that section could be invoked in the construction of s. 9 of the amending Act of 1950.

Mr. *Burnard's* contention on the first question was, in effect, that the means of transport referred to in para. (b) of s. 45 could not in the whole context of the section be deemed to apply to a means of transport owned or controlled by the employer. I am unable, however, to accept that view. Paragraph (a) of the section is confined in its terms to a means of transport provided by the employer primarily for the purpose of carrying workers employed by him. On the facts of the case para. (a) clearly did not apply, but I see no reason, as a matter of interpretation, why the means of transport referred to in para. (b) should be limited to a means independently of the employer, there being nothing mutually exclusive between the provisions of paras. (a) and (b) respectively as to the ownership of the means of transport. It was decided by the Court of Appeal in *Hassett v. Bridgeman* (No. 2) ([1948] N.Z.L.R. 1220, 1223; [1948] G.L.R. 511, 513), that the section should receive a liberal construction in favour of the worker, and that the words "means of transport" should be given a wide interpretation. That decision was upon the language of s. 7 of the Workers' Compensation Amendment Act, 1943, for which s. 45 has been substituted in even wider terms. The further contention was made by Mr. *Burnard* that

even though he might be wrong on the question of construction, there was, nevertheless, on the facts of the case, no evidence to show an express or implied authorization on the part of the defendant for the use by the plaintiff of the defendant's motor-truck on the occasion in question. I am unable to agree with that view of the evidence as, in my opinion, the evidence clearly showed an implied authority by the defendant in favour of the driver of the truck to use the vehicle for the purpose of conveying members of the shearing gang from the station to their homes in the circumstances arising on the day of the accident.

As to the second main question raised by Mr. *Burnard*, his contention was in effect that s. 45 of the Amendment Act, 1947, must be deemed to be limited to claims for compensation under the Workers' Compensation Act, 1922, and to have no application to a claim at common law. The section therefore, he submitted, could not be invoked upon the construction of s. 9 of the Amendment Act, 1950, (the indemnity section) in a case where the claim was at common law. He submitted further that apart from s. 45, the law was clear that on the facts of the case the accident could not be deemed to have arisen either in the course of the employment or out of the employment, and that view is no doubt sound having regard to the principle laid down by *Hewitson v. St. Helen's Colliery Co., Ltd.* ([1924] A.C. 59; 16 B.W.C.C. 230), and other cases cited by Mr. *Burnard* to the effect that the test to be applied is whether the worker was under a duty to his employer at the time of the accident.

In the course of the argument on this second question it occurred to me that the point raised was of such importance as to give rise to the consideration whether it should not be moved into the Court of Appeal for determination, and I invited counsel to express their views in that connection. Counsel for the defendant was agreeable to that course being adopted, and counsel for the third party intimated that while he had no authority to consent to such a course, he raised no objection to it. At the conclusion of the argument the matter was left on the footing that, if after further consideration I should still feel that the case warranted removal, I would take action accordingly.

Further consideration of the matter, however, leads me to the conclusion that my proper course of action is to follow the decision of *Hutchison, J.*, in *James v. Williams* ([1951] N.Z.L.R. 290; [1951] G.L.R. 152), and to hold that any extension of the scope of the employment of a worker (as in s. 45 of the Amendment Act, 1947) extends the area of the obligation of the third party under s. 9 of the Amendment Act, 1950, whether in respect of claims under the Workers' Compensation Act, 1922, or at common law. It was expressly so decided by *Hutchison, J.*, (*ibid.*, 295; 155); and it was a vital part of the decision in a case which in that respect was on all fours with the present case. It is true, as submitted by Mr. *Burnard*, that there is nothing in the report of *James v. Williams* ([1951] N.Z.L.R. 290; [1951] G.L.R. 152) to indicate whether or not the point involved in Mr. *Burnard's* second question was argued fully or at all. It was at least the subject of a considered judgment which I am prepared to follow, leaving it to the third party if it thinks fit to test the validity of my decision before the Court of Appeal in the ordinary way.

I, therefore, hold that the defendant is entitled to the indemnity sought by him in terms of the third-party notice, and there will accordingly be judgment for the defendant against the third party for the amount payable by the defendant to the plaintiff in terms of the judg-

ment already entered. The defendant will be allowed costs against the third party according to scale on the amount of such judgment, together with £10 10s. in respect of the present argument and the application for leave to issue the third party notice, as well as the issue of such notice. If either counsel should desire any variation in this order as to costs he is to be at liberty to submit a memorandum on the subject.

The third party, the Workers' Compensation Board, appealed from so much of the foregoing judgment as determined and adjudged that the plaintiff recover from the third party the sum of £1,443 12s. 7d., upon the grounds that such judgment was erroneous in fact and in law.

In the Court of Appeal,

*Shorland*, for the appellant. By virtue of s. 45 of the Workers' Compensation Amendment Act, 1947, a worker is deemed to be "in the course of his employment" if he is travelling to or from his work in a means of transport, not being public transport, which has been expressly or impliedly approved by the employer. The learned Judge found that there was an implied approval by the employer of the use of the truck by the worker. The main question on this appeal is whether s. 45 can be used to widen the scope of s. 9 of the Workers' Compensation Amendment Act, 1950, to include common-law claims against the employer. His Honour held that it could so be used (*ante*, p. 400 l. 39); and the correctness of that decision and of the decision in *James v. Williams* ([1951] N.Z.L.R. 290; [1951] G.L.R. 152) is the matter for decision here.

Two questions arise: (a) Was Green "in the course of his employment" by Maraki at the time of his accident? (b) If Green was not "in the course of his employment", can the fact that, for the purposes of a workers' compensation claim, he would be deemed, by s. 45 of the Workers' Compensation Amendment Act, 1947, to be "in the course of his employment", be used to widen the scope of the words "in the course of his employment" in s. 9 of the Workers' Compensation Amendment Act, 1950, so as to deem the plaintiff, Green, to be in the course of his employment for the purposes of common-law claim?

A. The plaintiff was not "in the course of his employment" by Maraki at the time of the accident. The learned Judge expressly found, that the accident to the plaintiff did not occur in the course of his employment by Maraki in so far as it was a question of fact (*ante*, p. 399 l. 40). On the evidence, the accident was outside working hours; the plaintiff was not receiving wages at any stage of the journey; the plaintiff was not making a journey for any purpose of his employer, but solely for his own purpose; and the evidence shows the plaintiff was free in the circumstances to remain at Wairongomai or to go away as he pleased.

[BARROWCLOUGH, C.J. Or remain at Ruatoria?]

Yes. If he decided to leave Wairongomai he was free to proceed by any means of transport he might choose, and, in travelling on Maraki's truck, he travelled as an indulgence. The plaintiff was clearly under no duty to his employer to travel on the employer's truck, and Maraki was under no obligation to provide transport for the plaintiff in respect of the particular journey. Consequently, the plaintiff was not "in the course of his employment" in the circumstances detailed in the evidence: *Hewitson v. St. Helen's Colliery Co., Ltd.* ([1924] A.C. 59, 66, 67, 70, 71, 81, 95, 98; (1924) 16 B.W.C.C. 230, 233, 234, 237, 239, 250, 264, 267); and *Newton v. Guest, Keen and Nettelfolds, Ltd.* ((1926)



19 B.W.C.C. 119, 125, 126), which would dispose of any argument that might be said to be made against the appellant based on the finding of the jury that the only practicable way, and as it was reasonably necessary for the plaintiff to have travelled from Ruatoria to Waipiro Bay: see, also, *Craw v. Forrest* ([1931] S.C. (Ct. Sess.) 634, 637, 640, 641); (1931) 24 B.W.C.C. Supp. 67, 71, 75, 77), and *Black v. Aitkenhead & Son* ([1938] S.C. (Ct. Sess.) 291); (1938) 31 B.W.C.C. Supp. 73), which were decisions on the construction of the words "in the course of employment" in s. 1 of the Workmen's Compensation Acts, 1906 and 1925, (U.K.), which is repeated in s. 3 of our Workers' Compensation Act, 1922. In s. 9 of the Workers' Compensation Amendment Act, 1950, similar words, "in the course of his employment" are used: so that the decisions of s. 1 of the Workers' Compensation Act, 1922, are applicable to the construction of s. 9 of the Workers' Compensation Amendment Act, 1950, by reason of the doctrine or canon of previously-accepted interpretation: see *31 Halsbury's Laws of England*, 2nd Ed. 491. There must be duty by the employee to his employer at the time if he is to be held to be "in the course of his employment". The plaintiff was not "in the course of his employment" at the time of his accident; and, accordingly, the claim is outside the scope of s. 9.

B. Section 45 of the Workers' Compensation Amendment Act, 1947, does not have the effect of extending the area of the obligation of the insurer under s. 9 of the Workers' Compensation Amendment Act, 1950, in respect of claims at common law. Section 45, which is in substitution for s. 7 of the Workers' Compensation Amendment Act, 1943, was enacted in a statute which comprised three parts: s. 45 appears in Part II. Section 7 was a workers' compensation provision pure and simple. Part I provides for employers' indemnity and it provides for a guaranteed indemnity for the worker recovering compensation. Part II is confined as to amendments to compensation. The plain purpose of s. 45 is to bring within s. 3 of the Workers' Compensation Act, 1922, certain accidents to workers suffered whilst they are travelling to their work, which, but for the section, would not give rise to a liability for payment of compensation; and it does so merely and solely to impose on the employer in the cases to which it applies a liability to pay workers' compensation. The section does not purport to amend the common law in any way or to impose any new common-law liability, as distinct from a workers' compensation liability. *Hay, J.*, in holding s. 45 widened the scope of s. 9, adopted the decision of *Hutchison, J.*, in *James v. Williams* ([1951] N.Z.L.R. 290, 294, 295; 40 [1951] G.L.R. 152, 154, 155).

Section 45 is a provision which amends and enlarges the statutory obligation to pay workers' compensation. It does not purport to enlarge any other liability; and as full effect can be given to it by construing it as dealing with workers' compensation only, the principle applicable is that it is not to be construed as altering the common law: *31 Halsbury's Laws of England*, 2nd Ed. 505. The Workers' Compensation Act, 1922, and all its amendments must be read as a whole; and both s. 45 of the Amendment Act, 1947, and s. 9 of the Amendment Act, 1950, are given their full meaning and effect if the words of s. 9, "in the course of the employment", are construed, in the case of a claim for workers' compensation which becomes payable by virtue of s. 45, as including for that purpose alone the case of a claimant who is travelling to or from work by an authorized means of transport in respect of which s. 45 bears upon claims as between worker and

employer. To go further and construe the words "in the course of  
"the employment", in common-law claims and Deaths by Accidents  
Compensation Act, 1952, as extending to cases in which the claimant  
was travelling to and from work by an authorized means of transport  
is to go further than merely reading the two sections together.  
This would attribute to s. 45 the effect of amending the law in respect  
of common-law and Deaths by Accidents claims, neither of which  
it purports to affect, and it is irrelevant to s. 9 which fixes liability  
as between the defendant and the third party; that is to say, s. 45  
by extending the area of the indemnity given by s. 9, because it  
extends the scope of employment for the purposes of the Workers'  
Compensation Act, 1922, and, in so doing, it extends the employer's  
obligation. The extension of the indemnity so effected is limited to  
claims for workers' compensation only, because it is only these  
additional workers' claims which s. 45 has brought within the area of  
the employer's liability. Accordingly, the area of obligation to indemnify  
prescribed by s. 9 extends that far, but no further. The purpose  
and object of s. 9, and indeed, of Part I of the Workers' Compensation  
Amendment Act, 1950, is to provide for indemnity of an employer in  
respect of his liabilities to his employees solely in his capacity as  
employer.

[To STANTON, J.] The words "in the course of employment",  
are words of clear meaning. They have been judicially construed,  
and there is no intended departure from that construction; and it so  
happens that, because of s. 45 of the Workers' Compensation Amend-  
ment Act, 1947, a man who is not really "in the course of employment"  
can be deemed to be in the course of his employment for the purposes  
of that section. Here, the breach of duty was failure to keep a proper  
look out. The whole basis of the judgment is not any breach of duty  
which Maraki, as the plaintiff's employer, owed him.

[BARROWCLOUGH, C. J. Maraki comes into it vicariously?]

Yes. It would be contrary to the apparent object and intentions  
of this Act to construe it as including a claim that is outside the category  
of workers' compensation claims. If the basis of extension of indemnity  
is that there has been an extension of liability, then it is clear that the  
only extension of liability provided in s. 45 is for workers' compensation,  
and the extension of indemnity should be correlative, and confined to  
that additional liability. It is erroneous to say that, because the  
employer's liability has been extended, the indemnity has been extended  
to a further or unlimited extent.

[To STANTON, J.] Section 45 is confined to claims for workers'  
compensation, and it cannot be used as enlarging the master's common-  
law duty to his servant, or as extending s. 9 in order to give cover in  
respect of a liability which had been incurred, not as a master, but as a  
motorist at common law. The claim in this action is not within the  
purview of s. 9, since to construe that section as covering the liability in  
the present case is to go beyond the purview of the statute, which is not  
to cover liability of third parties. Its object is solely to provide insur-  
ance covering the liability of the master to his servant, which arises out  
of the relationship of master and servant.

*Eichelbaum*, in support. Where it is sought to make the master  
vicariously liable to third parties for acts or omissions of his servant,  
the question often may merely be whether the particular act or omission  
for which it is sought to make the master liable was authorized by the

master, and, if so, that may decide the matter; but, if it does not, it may then become relevant to consider whether the act of the servant was in the course of employment, and in those latter cases the same test of duty as is applied for the Workers' Compensation cases is used—that is, was the servant doing something he was obliged to do: 5  
*Canadian Pacific Railway Co. v. Lockhart* ([1942] A.C. 591, 600; [1942] 2 All E.R. 464, 468); *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* ([1942] A.C. 509, 514, 519; [1942] 1 All E.R. 491, 494, 497); *London County Council v. Cattermole (Garages), Ltd.* ([1953] 2 All E.R. 582, 584, 585, 588, 589), which show that the relevant consideration as to whether the servant was in the course of his employment at the time of the act complained of is whether he was doing something which he was employed, and was bound, to do under and by the virtue of a contract with his master; and, accordingly, the test is the same as in the workers' compensation cases to which Mr. *Shorland* has referred. Further, the argument of the learned author of *Munkman on Employers' Liability at Common Law*, 2nd Ed. 101, where he refers to the *Century Insurance* case, is adopted. 10

For a defence to lie in an action when the doctrine of common employment was in force, it was necessary to show that the injured worker was "in the course of his employment" when injured, otherwise the defence would not go. The same test applies: see *Pollock v. Burt* ([1941] 1 K.B. 121, 130; [1940] 4 All E.R. 264, 267), which shows that the Court is concerned, not only in workers' compensation cases but also at common law, whether there is a duty imposed on the employee to perform the particular work or perform it in a particular manner, because of his duty to his employer. The test is the same whether the question be one of vicarious liability or common employment, or arising under the Workers' Compensation legislation. 15

*K. G. Scott*, for the respondent. Section 45 of the Workers' Compensation Amendment Act, 1947, provides that where an accident to a worker causing personal injury occurs while he is travelling to or from his work by a means of transport, the accident *shall be deemed* to arise "out of and in the course of the employment" under the conditions therein mentioned; and, from its opening words, it is clear that the worker must satisfy the provisions of s. 3 (1) of the principal Act. The effect of s. 45 is that if the only reason for concluding that the case does not satisfy the provisions of s. 3 (1) is that the worker suffered personal injury by accident while he was travelling to and from his work in the circumstances specified in the provision, his right of action is not excluded for that reason. 20

It is conceded that, at common law, a man travelling to and from his work is not "in the course of his employment". Section 45 alters that situation, subject to the fulfilment of the requirements of that section and of s. 3 (1). 25

As to appellant's submission that the means of transport referred to in s. 45 (1) (b) could not, on the proper construction of the whole content of the section, be deemed to apply to a means of transport owned or controlled by the employer: Paragraph (a) is confined in its terms to a means of transport provided by the employer primarily for the purposes of carrying workers employed by him. On the evidence, that is not this case. The question then arises, do the facts of the case support the claim or view that para. (b) may be invoked. The general purport and effect of s. 45 (1) (a) is already incorporated in para. (b) of the same subsection. There is nothing mutually exclusive between 30

paras. (a) and (b) respectively as to the ownership of the means of transport. As a matter of interpretation, there is no reason why the means of transport referred to in para. (b) should be limited to a means of transport independently of the employer.

- 5 The general provision in s. 45 is not new: it replaces s. 7 of the Workers' Compensation Amendment Act, 1943, but widens the scope and effect of the earlier section. Section 7 was the subject of consideration in this Court in *Hassett v. Bridgeman* (No. 2) ([1948] N.Z.L.R. 1220, 1223, 11. 32-47; [1948] G.L.R. 511, 513) and it is to be given a wide and  
10 liberal interpretation: see, also, *Logie v. Union Steam Ship Co. of New Zealand, Ltd.* ([1945] N.Z.L.R. 388, 401; [1945] G.L.R. 169, 176). The section was at first construed the other way—broadly as not applying to transport provided by the worker except in exceptional cases: see *Gollan v. Westfield Freezing Co., Ltd.*, ([1945] N.Z.L.R. 103; [1945] G.L.R. 11), and *Shaw v. Charming Creek-Westport Coal Co., Ltd.* ([1945] G.L.R. 401).

- Section 45 of the Workers' Compensation Amendment Act, 1947, is even wider in its terms than the earlier s. 7, which it replaced. The term "means of transport" is intended to cover all means of travelling  
20 to or from work, and s. 45 is remedial and must receive a liberal interpretation: Acts Interpretation Act, 1924, s. 5 (j). The only apparent exclusion is a public passenger service. The words "or has expressly" or "impliedly authorized the use for the purpose" relate back solely to the earlier words "by a means of transport", as used in s. 7 of the  
25 Workers' Compensation Amendment Act, 1943; and the difficulty was overcome in s. 45 of the Amendment Act, 1947, of their closer association: and it is not limited to a claim for Workers' Compensation for injury received "in the course of the employment"; see, also *Maxwell on the Interpretation of Statutes*, 9th Ed., 3-5. The real question  
30 here is this: Can s. 45 be invoked in the interpretation of s. 9 of the Workers' Compensation Amendment Act, 1950? In both s. 45 and s. 9 the words used are "in the course of the employment": there is no apparent difference, in the meaning of those phrases; but, if there is, s. 45 is the narrower. The term is used in s. 45 to widen both liability  
35 and indemnity. The whole of the Workers' Compensation Act, 1922, and its amendments must be read together irrespective of the fact that any Amendment Act is, or is not, divided into Parts.

- The words "out of" and "in the course of" the employment are in the statute used conjunctively and not disjunctively; and, therefore,  
40 for an injury by accident to be within the statute both these conditions must be satisfied: *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. 233, 235, paras. 436 *et seq.* and also para. 462.

- Section 45 makes a vital change in using the words, "deemed to  
"arise out of and in the course of the employment", subject to the  
45 provisions of that section. Section 9 of the Workers' Compensation Amendment Act, 1950, granted indemnity to a defaulting employer against certain classes of claim, including common-law claims, subject to certain administrative details on his part, in respect of accidents: to workers occurring "in the course of his employment". Consequently,  
50 the words, "in the course of his employment" in s. 9 of the Amendment Act, 1950, include accidents occurring "in the course of employment" as extended by s. 45 of the Amendment Act, 1947. Section 9 makes the insurer liable to indemnity against any liability of the employer, whether for Workers' Compensation or at common law, for accidents  
55 occurring to a worker "in the course of his employment". There

cannot be any difference, for present purposes, between these expressions; but, if there is, then that in s. 45 is the answer. Section 9 had its counterpart in the now-repealed s. 11 of the Amendment Act, 1947, which contains s. 45: this is indicative, that the latter term was intended to widen both liability and indemnity: see Acts Interpretation Act, 1924, s. 5 (c). The Legislature has seen fit to cover the period or time of duration of employment to embrace the conditions of s. 45: see Acts Interpretation Act, 1924, s. 5 (i); 31 *Halsbury's Laws of England*, 2nd Ed. 477, paras., 592-600; and *Maxwell on the Interpretation of Statutes*, 9th Ed. 322. Before the enactment of s. 9, the common law was as appears from *Hewitson v. St. Helen's Colliery Co., Ltd.* ([1924] A.C. 59; (1924) 16 B.W.C.C. 230). The mischief or defect for which the common law did not provide was the location or area of work and distances to be travelled, which are almost integral parts of commercial, if not national, economy, and the removal of a limitation upon a certain class of actions not earlier covered. The Legislature has remedied the situation by s. 45 ("deemed to be in the course of employment"), and the true reason of the remedy is the protection of the worker and also the security of the employer: *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed., Supp. 4; and see *Shirley v. MacDougall* ([1934] N.Z.L.R. 1059, 1068; [1934] G.L.R. 696, 700).

The expression "in the course of his employment" in s. 9 of the Amendment Act, 1950, are plainly taken from the earlier statutes *in pari materia*, which have received judicial interpretation; and it must be assumed that Parliament was aware of such interpretation and intended it to be followed in the later enactment: see 31 *Halsbury's Laws of England*, 2nd Ed., 481, para. 604, and two articles in (1949) 25 *New Zealand Law Journal*, 329 and 345, but see last sentence on p. 348; and see *James v. Williams* ([1951] N.Z.L.R. 290; [1951] G.L.R. 152).

Here, the plaintiff would have a claim at common law, apart altogether from s. 45 of the Amendment Act, 1947, as the driver owed him a duty from merely offering him a seat in the truck or acquiescing in his travelling on the truck, when not prohibited by the employer. If the circumstances are such that the accident is within s. 45 (though common-law liability does not arise therefrom) then the indemnity applies.

*Shorland*, in reply. The respondent's counsel appeared to base his argument on the contention that s. 45 controlled the construction of the words in s. 9 "in the course of the employment", because the same words appear in both sections. That submission overlooks the all-important point that the words of s. 45 do not purport to alter the judicial construction which has long been placed on the words "course of employment". Section 45 deemed those workers who came within its purview to be "in the course of the employment", and so to be entitled to recover workers' compensation. Consequently, it is fallacious to treat s. 45 as though it were a section controlling s. 9. The construction of s. 9 is that, in order that the indemnity should apply to a worker who has recovered damages or compensation, whether under the Workers' Compensation Act, 1922, or any other named act, he must be shown to have been "in the course of the employment", at the time. The inquiry under s. 9 will always be the precise inquiry "was the worker in the course of his employment?". That is the only inquiry to be made in this case; and the answer is "No". It is not possible to make the further answer: "He was in the course of his employment because s. 45 would have deemed him to be in the

"course of his employment", that applies to a common-law case such as the present one. General words in a statute must receive some limitation: as to the canon of construction, see *13 Halsbury's Laws of England*, 2nd. Ed. 505.

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*Cur. adv. vult.*

The judgment of the Court was delivered by

10 BARROWLOUGH, C.J. The present appeal concerns one aspect of an action in which a station-hand named Green claimed damages from Maraki in respect of an accident in which Green was involved whilst travelling in a truck driven by a servant of Maraki. The appellant Board was joined in that action as a third party. The history of the accident, and the findings of the jury in the action, are set out fully in the judgment appealed from, (*ante*, p. 398 l. 22) and need not be repeated here. For present purposes it is sufficient to summarize the matter as follows:

(1) In the action, Green recovered damages against Maraki at common law for injuries sustained as a result of the negligent driving of Maraki's truck by a servant of Maraki.

20 (2) At the time of the accident Green was an employee of Maraki. He was not then engaged upon the work he was employed to do; but was in fact returning to his house for the week-end and with the intention of returning to his work in due course.

25 (3) It had been agreed that the Court should determine the issue as between Maraki and the appellant Board (the third party); for which purpose the Court should have power to determine any question of fact not covered by the findings of the jury. Pursuant to this agreement, the learned trial Judge did determine that "the evidence clearly showed an implied authority by Maraki in favour of the driver of the truck to use the vehicle for the purpose of conveying members of the shearing gang (which included Green) from the station to their homes

30 "in the circumstances arising on the day of the accident" (*ante*, p. 400 l. 6). No complaint was made as to this finding of the learned trial Judge and it follows, from s. 45 (1) (b) of the Workers' Compensation Amendment Act, 1947, that when the accident occurred, Green was travelling from his work by a means of transport (other than a public passenger transport service) the use of which Maraki had expressly, or impliedly, authorized. The accident was, therefore, one which for the purposes of s. 45 must be deemed to have arisen out of, and in the course of Green's employment.

40 (4) Maraki had made default in insuring against liability in accordance with Part I of the Workers' Compensation Amendment Act, 1950, and, in terms of s. 20 of that Act, the appellant Board was, therefore, deemed to be Maraki's insurer for the purposes of that Part.

45 There was no dispute between the parties to the present appeal upon any of the matters referred to in paras. (1) to (4) above. Upon that state of affairs, Maraki sought to have it declared that by virtue of s. 9 of the Workers' Compensation Amendment Act, 1950, the appellant Board was deemed to be his indemnifier in respect of the damages recovered against him by Green, and arising out of the accident which, Maraki contended, was an accident occurring to Green "in the course of his employment". The appellant Board denied that it was the indemnifier of Maraki in respect of the damages mentioned and the sole question involved in this appeal is whether, in the circumstances mentioned, s. 9 of the Workers' Compensation Amendment Act, 1950, does make the Board the indemnifier of Maraki in respect

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of the damages recovered against Maraki at common law. In the Court below, *Hay, J.*, following the judgment of *Hutchison, J.*, in *James v. Williams* ([1951] N.Z.L.R. 290; [1951] G.L.R. 152), held that the Board was the indemnifier of Maraki.

Mr. *Shorland* admitted that the present case falls literally within the general words used in s. 45 of the 1947 Amendment, but he submitted that the fact that general words were used was not in itself a conclusive reason why every case falling within them should be governed by that section. He argued first that at common law and apart from the effect of s. 45, Green could not possibly be said to have been in the course of his employment with Maraki. Upon the facts proved in evidence, and in the light of the cases quoted by him and by Mr. *Eichelbaum*, we think that contention was sound. Mr. *Shorland*, next contended that general words in a statute are not to be construed so as to alter the common law, or the previous policy of the law, if a sense or meaning can be applied to them consistent with the intention of preserving the existing policy untouched. For this proposition he cited *31 Halsbury's Laws of England*, 2nd Ed. 505, para. 648; and that contention also must be accepted as sound. The question then is: can the general words of s. 45 be construed in such a way that they will be consistent with a pre-existing policy of the law under which Green was not, at the time of the accident, "in the course of his employment"? Obviously they cannot be construed so as to be entirely consistent with the pre-existing law. They were clearly intended to alter the law and to enlarge the circumstances under which, for some purposes at all events, a worker would be deemed to be "in the course of his employment". Mr. *Shorland*, concedes this and admits that if the judgment obtained against Maraki had been a judgment for compensation under the Workers' Compensation Act, 1922, Green would be deemed to have been in the course of his employment and ss. 9 and 20 of the Workers' Compensation Amendment Act, 1950, would operate to make the Board the indemnifier of Maraki. But it was Mr. *Shorland's* submission that the general words of s. 45 can and ought to be construed so as not to alter the pre-existing law in a case concerning damages at common law.

Upon this question the fact that s. 45 appears in a Workers' Compensation Act, 1922, is some indication that, as Mr. *Shorland* suggests, the only purpose of that section is to bring within s. 3 of the Workers' Compensation Act, 1922, certain accidents which, but for the section, would not give rise to a claim for compensation, that it does not purport to amend the common law in any way, and that it is intended to amend only the statutory obligation to pay compensation as distinct from damages. The argument has a certain attractiveness; but it is outweighed, we think, by the following considerations.

The Workers' Compensation Amendment Act, 1947, as originally enacted, contained a section which was the counterpart of s. 9 of the Workers' Compensation Amendment Act, 1950. Save for the substitution of the Board for the General Manager of the State Fire Insurance Office, and some other changes not material for present purposes, s. 9 of the Amendment Act, 1950, is identical with s. 11 of the Amendment Act, 1947, which it replaced. Section 11 (1) is as follows:

11. (1) Subject to the provisions of this Part of this Act and of any regulations made for the purposes thereof, the General Manager shall indemnify every employer who employs any worker or workers in any employment to which the principal Act applies in respect of all sums which the employer becomes liable to pay under or by virtue of the principal Act, the Deaths by Accident Compensation Act, 1908,



the Coalmines Act, 1925, the Mining Act, 1926, or Part I, Part II, Part V or Part VI of the Law Reform Act, 1936, or at common law as and for compensation or damages or contribution for the death of or personal injury to any such worker as aforesaid caused by accident occurring on or after the first day of April nineteen hundred and forty-nine, to that worker in the course of his employment by the employer in any employment to which the principal Act applies.

In s. 11, Parliament clearly made provision for indemnifying employers against their liability not only under the Workers' Compensation Act, 1922, but also under certain other named Acts, and at common law in respect of injuries to workers caused by accidents in the course of their employment. One of the objects of that provision, if not the principal object, was to ensure that workers would not recover judgments against their employers in vain. Workers were placed in a specially favoured position, and though the legislation giving them that favoured position appeared in a Workers' Compensation Act, 1922, it was nevertheless quite clear that it applied, not only to judgments that they might obtain against their employers for compensation, but also to judgments for damages under the other named Acts and at common law. The only limitation on this favoured position of workers was that s. 11 of the 1947 Act applied only when the worker was injured in the course of his employment and in an employment to which the Workers' Compensation Act, 1922, applied. If those conditions were fulfilled, a worker obtaining any such judgment was assured that his judgment would be satisfied because the employer was indemnified in respect of it by the State Fire Insurance Office.

But the Workers' Compensation Amendment Act, 1947, did not stop at that point in the remedial measures it contemplated for those who were in the position of workers injured in the course of their employment. By s. 45 it made provision for extending the circumstances in which a worker should be deemed to be in the course of his employment. Unless there were adequate grounds for coming to a contrary conclusion, it would follow that the indemnity created by s. 11, which applies when the worker is injured in the course of his employment, must also apply when, by virtue of s. 45, the worker is deemed to be in the course of his employment. Mr. *Shorland* argued that there were grounds for coming to a contrary conclusion. He pointed out that s. 45 appeared in Part II of the Act whereas s. 11 was in Part I; that Part II was headed "Amendments as to Compensation" and that the extended meaning given by s. 45 to the phrase "in the course of his employment" applied therefore only in cases where a judgment for "compensation" had been obtained. As to that argument, it is sufficient to refer to s. 5 (f) of the Acts Interpretation Act, 1924, and to the following passage from the judgment of Lord Goddard, L.C.J., in *R. v. Surrey (North-Eastern Area) Assessment Committee* ([1948] 1 K.B. 28; [1947] 1 All E.R. 276): "But while the Court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is clear that you cannot use such headings to give a different effect to clear words in the section where there cannot be any doubt as to their ordinary meaning" (*ibid.*, 32; 278).

The ordinary meaning of the words in s. 45 does not appear to be in any doubt, and if a further reason is needed for declining to attach weight in the present inquiry to the heading of Part II of the Act, it can be found in the fact that in s. 47 (also in Part II) there is reference to the cost of conveyance of injured workers which is certainly not "compensation" strictly so called, and is expressly linked with the pro-



visions of Part I. Section 46 also refers to the cost of artificial limbs which cannot be included strictly within the term "compensation".

The first and most elementary rule of construction is that it is to be assumed that words and phrases are used in their ordinary meaning and that there should be no departure from that presumption where the language under consideration is susceptible of another meaning unless adequate grounds are found either in the history or cause of the enactment, or in the context, or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the legislature. See *Maxwell on the Interpretation of Statutes*, 10th Ed., 3, 4. We can find no adequate grounds in the history, or cause of the enactment, or in the context, for departing from the literal interpretation of s. 45. One of the consequences of a literal interpretation is certainly to alter the pre-existing law, and maybe to create strange consequences and results which may seem surprising. But it seems to us that those consequences can be avoided only by reading into s. 45 after the words "shall be deemed" the words "for the purposes of the principal Act" or other words of similar import. That, we think, is not permissible here. The present case is very like *London Brick Co., Ltd. v. Robinson* ([1943] A.C. 341; [1943] 1 All E.R. 23). In that case it was argued that the words "leaves a widow" should be read as "leaves a widow who is claiming under this act". But though the result of interpreting the words literally and without the suggested gloss seemed to *Viscount Simon*, L.C., "at least surprising" (*ibid.*, 348, 26); he felt constrained to interpret them in their literal meaning even though that interpretation was "fortunate for the infant".

In this case, we feel similarly constrained and, though the construction we would place upon ss. 11 and 45 of the Workers' Compensation Amendment Act, 1947, is to alter, and to alter in an Act described as a Workers' Compensation Act, 1922, the pre-existing law in a case concerned only with damages and not with "compensation"; nevertheless we think that the present is a case where the words are so clear and unambiguous that that result must be assumed to have been the intention of the Legislature. We cannot see how ss. 11 and 45 can be given a sense, or meaning, which is consistent with an intention of preserving the pre-existing policy of the law with regard to claims at common law, any more than with regard to claims for compensation. Both classes of claims have been placed deliberately and intentionally in one and the same category. Section 11 has since been repealed and replaced, with some changes, by s. 9 of the Workers' Compensation Amendment Act, 1950; but it was not and could not have been suggested that the changes referred to produced any consequences which are relevant to the present inquiry.

In the result the appeal must be dismissed with costs to the respondent. As the case is from a distance, 50 per cent. extra is allowed for setting down and arguing the case to judgment.

*Appeal dismissed.*

Solicitors for the appellant: *Burnard and Bull* (Gisborne).

Solicitors for the respondent: *Gillanders, Scott, and Wilson* (Gisborne).

PALMERSTON NORTH CITY CORPORATION v.  
POTBURY.

SUPREME COURT. Palmerston North. 1954. November 17; December 22. BARROWCLOUGH, C.J.

*Tenancy—Service Tenancy—Tenancy to continue until Termination of Tenant's Employment by Landlord—On Termination of Such Employment, Tenancy "ended" by Effluxion of Period determined by Reference to Duration of Employment—Claim for Possession within Jurisdiction of Magistrates' Court—"Ended"—Magistrates' Courts Act, 1947, s. 31 (1) (a).*

An agreement set out the terms of a tenancy by P. of a dwellinghouse owned by the Corporation. P. expressly acknowledged that the tenancy was "consequent upon, incidental to, and conditional upon" his employment by the Corporation. It was agreed that it should continue until the termination of that employment. The employment was validly terminated, and a demand for delivery of possession of the dwellinghouse was made. P. did not comply with the demand, and the Corporation brought an action for recovery of possession. The learned Magistrate declined jurisdiction, believing himself bound by *Town v. Stevens* (1899) 17 N.Z.L.R. 828).

On a motion for mandamus commanding the Magistrate to hear and determine the action.

*Held*, 1. That the tenancy, which was not a tenancy at will, had not been "determined" in either of the ways mentioned in s. 31 (1) (a) of the Magistrates' Courts Act, 1947; but it had "ended" (within the meaning of that word as therein used) by effluxion of the period for which it was agreed that it should last—namely, a period to be determined by reference to the duration of another arrangement; and, when that arrangement ceased to be operative, the tenancy was to be regarded as having come to an end by effluxion of time.

*Town v. Stevens* (1899) 17 N.Z.L.R. 828) applied.

2. That accordingly, the action was within the jurisdiction of the Magistrate; and a writ of mandamus would issue directing him to hear and determine it.

## MOTION for mandamus.

By an agreement in writing dated August 22, 1952, the Corporation agreed to let, and the defendant Potbury agreed to take as tenant, a certain dwellinghouse owned by the Corporation, at a rental of £1 12s. 6d. a week. In cl. 1 of the agreement it was expressly acknowledged by Potbury that "the tenancy is consequent upon, incidental to, and "conditional upon his employment by the Corporation." Clause 2 of the agreement was as follows:

2. The tenancy shall commence on the 26th day of August, 1952, and shall continue until the termination of the tenants employment unless this Agreement shall be terminated prior to that date by either party giving to the other one months previous notice in writing terminating such tenancy and upon the termination of the employment or upon the expiration of such notice which ever shall first occur the tenant will immediately vacate the said property.

At the date of the agreement, Potbury was, in fact, in the employment of the Corporation. That employment was, on July 17, 1954, validly terminated, though whether at the instance of employer or employee, or by mutual arrangement, is not disclosed. Counsel did not suggest that the manner of the termination of the employment was at all relevant to the question in issue in these proceedings.

On July 20, 1954, the Corporation wrote to Potbury as follows:

Dear Sir,

SERVICE TENANCY

I have to remind you that under Clause 2 of your Service Tenancy executed on the 22nd day of August, 1952, occupation of the residence at 109 Napier Road must be vacated immediately on cessation of employment with Council.

Will you therefore please make arrangements to deliver the house to Council on Tuesday, 27th day of July, 1954.

Potbury failed to deliver up possession and the Corporation brought against him, in the Magistrates' Court at Palmerston North, an action for recovery of possession of the dwellinghouse. The learned Magistrate (who was named as a defendant in these proceedings) declined jurisdiction, believing himself bound to do so by the decision in *Town v. Stevens* (1899) 17 N.Z.L.R. 828. The Corporation moved for a writ of mandamus commanding the Magistrate to hear and determine the action.

*Shires*, for the plaintiff.

*Gilliand*, for the defendants.

*Cur. adv. vult.*

BARROWCLOUGH, C.J. [After stating the facts, as above:] The jurisdiction of a Magistrate is limited by the Act which constitutes the Magistrates' Courts. For present purposes, a Magistrate has jurisdiction to hear and determine an action for recovery of land only in the circumstances mentioned in s. 31 of the Magistrates' Courts Act, 1947. It was submitted for the Corporation that the present case comes within para. (a) of subs. 1 of that section. The relevant parts of that paragraph are as follows:

(a) Where the term and interest of the tenant . . . has ended or been determined, either by the landlord or by the tenant, by a legal notice to quit or demand of possession, and the tenant . . . has neglected or refused to quit and deliver up possession of the land . . .

In *Town v. Stevens* (1899) 17 N.Z.L.R. 828 *Williams, J.*, had to consider the provisions of s. 175 of the Magistrates' Courts Act, 1893—a section which differs in no material respect from the above-quoted para. (a). I quote the following extracts from his judgment: "The word 'ended' is in contrast with the word 'determined'. The word 'ended' must mean, ended by effluxion of time . . . 'Determined' means, put an end to by one of the parties; 'ended' means, ended by effluxion of time, and not ended by the acts of the parties" (*ibid.*, 830).

In the present case it was not suggested, and it could not have been suggested, that there had been any notice to quit. It was argued by Mr. *Shires* that the term, or interest of the tenant had been determined by a demand of possession—the letter of July 20, 1954, already quoted. But as was pointed out by *Williams, J.*, in the case just cited, that part of the section applies to tenancies at will where a demand of possession is necessary before a right to enter accrues. In the present case, the tenancy was not at will.

The letter of July 20 had no potency to end or determine the lease. It was quite an ineffectual document except in so far as it served to remind the tenant of his obligations, and intimated to him that though the Corporation had a right to expect the house to be vacated immediately on the cessation of employment, the Corporation would be content if it were vacated on July 27. In my opinion, this tenancy was not

"determined" in either of the two ways mentioned in the section and referred to by *Williams, J.* It remains to consider whether the tenancy was "ended".

Upon this question both sides relied on *Town v. Stevens* ( (1899) 17 N.Z.L.R. 828), and it is necessary to consider just what was there decided. If the report of the argument in that case is correct, it was never contended that that tenancy had "ended"; but only that it had been "determined". The real question that *Williams, J.*, had to decide was whether the tenancy had been determined in either of the two ways in which a tenancy must be determined if an action for recovery of the land is to be within the jurisdiction of a Magistrates' Court. *Williams, J.*, held that it had not been so "determined". He also held—though, as I have said, it does not appear to have been argued—that the tenancy he had to consider could not be said to have "ended". In arriving at that conclusion, the learned Judge stated what was meant by the word "ended" in that particular context. He said it must mean "ended by effluxion of time" (*ibid.*, 830) and (further down on the same page) "ended by effluxion of time and not "ended by the acts of the parties". The argument for the defendant was that because the employment had been put to an end by the act of the parties, so also had the tenancy been put to an end by their act, because the tenancy ended when the employment ceased. For the plaintiff Corporation, it was said that the ending of the tenancy was only an indirect consequence of the act of the parties; and that the real and effective cause of the termination of the tenancy was effluxion of time—the running out of the period of the employment. The distinction is a fine one, and perhaps rather academic, though it involves a practical question of considerable importance, as the jurisdiction of the Magistrate depends entirely on how it is answered. It follows that the question I have to decide must be determined by making a fine distinction, and so far as I can ascertain, this fine distinction has not hitherto been the subject of judicial consideration. It was certainly not adverted to in *Town v. Stevens* ( (1899) 17 N.Z.L.R. 828), where the relevant facts were entirely different.

After a good deal of hesitancy, I have come to the conclusion that the tenancy in this case can more properly be said to have "ended" than to have been "determined". I adopt the distinction made by *Williams, J.*, in reference to those two words. The act of the parties was to determine the employment and nothing more. It was not suggested to me that the formula by which the employment was ended contained any reference to the tenancy. It so happens that an indirect result of the parties' determination of the employment was that the tenancy simultaneously came to an end; but that, I think, was an indirect and secondary consequence, and does not alter the fact that the tenancy ended by effluxion of time, *i.e.*, by the running out of the period for which it was granted. It was expressed to commence on August 26, 1952, and was to continue until the termination of the tenant's employment. This tenancy was one which was to last for a period to be determined by reference to the duration of another arrangement, and I think that when that other arrangement ceased to be operative, the tenancy ought to be regarded as having come to an end by effluxion of time, *i.e.*, by the effluxion of the period for which it was agreed that it should last. That being my view of the matter, I think that the action was within the jurisdiction of the Magistrate, and that the plaintiff Corporation was entitled, and is entitled to have it heard in the Magistrates' Court.

A writ of mandamus will issue directing the first defendant to hear and determine the action. The plaintiff Corporation is entitled to costs against the second defendant. The present proceedings are taken under Chapter II of Part VII of the Code of Civil Procedure and are therefore within Item 13 of Table C in the Third Schedule. Under the power conferred by Item 37 of the Table, I allow costs under the middle scale. 5

It may not be inappropriate to observe that the hearing in the Magistrates' Court of actions for the recovery of land in such cases as the present, will prove to be less expensive for both landlords and tenants; though that circumstance is not, of course, of any moment in deciding whether or not the Magistrates' Courts Act, 1947, has conferred on Magistrates the jurisdiction to hear them. 10

*Writ of mandamus to issue.*

Solicitors for the plaintiff: *Cooper, Rapley, Rutherford, and Bennett* (Palmerston North).

Solicitors for the defendants: *Jacob and Grant* (Palmerston North).

[IN THE SUPREME COURT AND IN THE COURT OF APPEAL.]

### ATTORNEY-GENERAL, *EX RELATIONE* HUTT RIVER BOARD, AND HUTT RIVER BOARD *v.* LEIGHTON.

SUPREME COURT. Wellington. 1953. March 26, 27, 30; July 23.  
HUTCHISON, J.

COURT OF APPEAL. Wellington. 1954. April 1, 5, 6; December 17.  
FAIR, J.; STANTON, J.; F. B. ADAMS, J.

*River—Accretion to Land—Building-up of Land not wholly due to Accretion, as Major Portion thereof due to Artificial Works—Certificate of Title not to be issued except in Respect of True Accretion—Notice of Application for such Certificate of Title to be given to Attorney-General and River Board—“Navigable” Coal-mines Act, 1925, s. 206.*

*Land Transfer—River-bed—Accretion to Land—Certificate of Title to be limited to True Accretion—Such Title not to issue without Notice to Attorney-General and River Board—Duties of District Land Registrar in Respect thereof indicated—Land Transfer Act, 1952, s. 81.*

The respondent was the owner of an area of land bounded by the Waiwhetu Stream. She applied to the District Land Registrar for an amendment of her certificate of title so as to include therein an area of about a quarter of an acre, which, she claimed, had been added to her land by accretion. The District Land Registrar intimated that he proposed to accede to this application, but he refrained from doing so when the present action was begun.

The Attorney-General and the Hutt River Board sought a declaration that the fee-simple title to the stream-bed was vested in the Crown, and that the building-up of the portion of the stream-bed mentioned was not due to accretion, but was the result of artificial works; and an order restraining the defendant from applying for the issue of a Land Transfer title in respect of such land.

The Attorney-General and the River Board contended that the stream was vested in the Crown under s. 206 of the Coal-mines Act, 1925, and that the area of the land in question had not been formed by accretion, but, in part, by actual reclamation. The learned trial Judge held that accretion had not been established, except as to approximately one-quarter or one-third of the area claimed. (In the Court of Appeal, all parties accepted that finding.)

The learned trial Judge gave judgment for the defendant. The Attorney-General and the Hutt River Board appealed.

*Held*, by the Court of Appeal. That the building-up of that portion of the Waioheta Stream claimed by the respondent riparian owner was not wholly due to accretion, but was, as to the major portion thereof, due to artificial works.

*Held*, by the Court of Appeal, *Fair and Stanton, JJ., F. B. Adams, J.*, dissenting, 1. That the limited nature of the respondent's interest as riparian owner in the stream-bed, arising in part from artificial reclamation, should not be converted into the full and indefeasible title indicated by a certificate of title, except for some cause, such as true accretion, which is capable of altering legal rights.

*Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool), Ltd.* ([1915] A.C. 599) applied.

2. That the respondent was not entitled to the issue of a certificate of title for the land claimed by her; but this determination was without prejudice to her right to apply for and obtain a certificate of title for so much of the land as she might be able to show had been built-up by accretion; and that notice of any such application was to be given to the Attorney-General and the River Board.

*Semble, per curiam*, 1. That it is desirable that, in all cases where application is made to the District Land Registrar for the addition of any portion of the bed of a stream to a riparian owner's title, notice of such application should be given to the Crown and to any River Board exercising jurisdiction over the stream.

2. That the practice of inserting, in a certificate of title for land bounded by a stream, a statement as to whether the riparian owner is entitled to the bed of a stream to its middle line is not a suitable one for New Zealand, having regard to established practice, the provisions of s. 206 of the Coal-mines Act, 1925, the provisions of the River Boards Act, 1908, and the possibility of difficulties arising out of s. 35 of the Crown Grants Act, 1908, as to "creeks".

*In re White* (1927) 27 N.S.W.S.R. 120) referred to.

Observations and discussion as to the meaning and operation of s. 206 of the Coal-mines Act, 1925, and of the word "navigable" therein.

Appeal from the judgment of *Hutchison, J.* (*post*, p. 416) allowed.

ACTION, in which the plaintiffs claimed:

- (a) A declaration that the fee-simple title to the said stream-bed is vested in the Crown.
  - (b) A declaration that the building-up of that portion of the stream-bed mentioned in paragraph 4 of the statement of claim "where improvements have been effected by the Hutt River Board" is not due to accretion but is the result of artificial works.
  - (c) An order restraining the defendant from applying for the issue of a Land Transfer title in respect of such land.
- 10 The declaration and order sought in paras. (b) and (c) were sought by the Attorney-General on the relation of the Hutt River Board; but para. (a) was an added claim made by the Attorney-General independently.

The defendant was the owner of an area of land bounded by the Waiwhetu Stream. She applied to the District Land Registrar for an amendment of her certificate of title so as to include therein an area of about a quarter of an acre, which, she claimed, had been added to her land by accretion. The District Land Registrar intimated that he proposed to accede to this application, but he refrained from doing so when the present action was begun.

*Haughey, Oakley, and Horsley*, for the plaintiffs.

*Wild and Dalgety*, for the defendants.

*Cur. adv. vult.*

HUTCHISON, J. At the opening of the hearing, Mr. *Haughey*, who wished to appear for the Attorney-General in relation to the claim made in para. (a), while leaving the general conduct of the action to counsel instructed by the Hutt River Board, asked leave so to do. He cited 4 *Halsbury's Laws of England*, 3rd Ed., p. 445, para. 924, of which the third subparagraph reads :

The Attorney-General may appear either in person or by counsel, or he may authorize the relator to conduct the case and instruct counsel on his behalf. The Attorney-General cannot then appear independently except by special permission of the Court.

He asked for the special permission referred to in that subparagraph. Mr. *Wild*, for the defendant, not opposing, I granted this permission but reserved the question of the terms on which it was granted. I should, perhaps, say that the reason why the Hutt River Board was a plaintiff as well as the Attorney-General on the relation of the Board, was that the action had originally been commenced by the Board as the sole plaintiff, and the Attorney-General, on the relation of the Board, had later been added as a co-plaintiff.

The claim to the declaration sought by para. (a) of the prayer of the amended statement of claim is based on a submission that the Waiwhetu Stream is a "navigable river" within the meaning of s. 206 of the Coal-mines Act, 1925.

Section 206 reads :

(1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown ; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.

(2) For the purpose of this section—

"Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks :

"Navigable river" means a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.

(3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

The defendant's certificate of title to the land that she owns on the bank of the stream shows (and the original Crown grant showed) the land as bounded by the bank of the stream ; but the defendant claims that her property extends to the original middle line of the stream by virtue of the common-law presumption *ad medium filum aquae*. This presumption, of course, could not apply if subs. (1) of s. 206 applies.

The Waiwhetu River is a slow-flowing stream in the southern part

of the Hutt Valley, about five miles in length, running from its source generally in a westerly and southerly direction, and discharging into the Hutt River near its mouth. There was no evidence that it is at the material place tidal. In its natural state it was considerably  
5 choked by willows and weeds. Its width is variously shown on plans as up to  $1\frac{1}{2}$  to 2 chains wide at places in the oldest plan. The operations of the Hutt River Board, as far as this stream is concerned, are directed, for the purpose of avoiding flooding, to keeping a clear channel 15 ft. to 16 ft. wide. On this stream are sometimes used canoes, rafts, and  
10 flat-bottomed boats. The verbal evidence is silent as to what these craft are used for; but there can be no doubt that it is for the purpose of casual and unorganized recreation, as in the photographs put in by the plaintiffs. The only larger vessel referred to in the evidence as used on the stream is the River Board's weed-cutting launch, which  
15 draws 14 in.

To describe such a stream as a navigable river appears to be bold. The question, however, must be answered by reference to s. 206 (2), and the test is whether the Waikato Stream is:

... of sufficient width and depth (whether at all times so or not) to be  
20 used for the purpose of navigation by boats, barges, punts, or rafts.

In my opinion, in accordance with one of the submissions for the defendant, the question turns on the meaning of the words "for the purpose of navigation". "Navigation", in my view, is something  
25 that is purposeful, something that has a definite object; and I turn to consider what the contemplated purpose and object are.

The original section from which s. 206 comes, was s. 14 of the Coal-mines Act Amendment Act, 1903, which was passed shortly after the hearing by the Court of Appeal of *Mueller v. Taupiri Coal-mines, Ltd.* (1900) 20 N.Z.L.R. 89; 3 G.L.R. 138. The judgment of the Court  
30 in that case in favour of the plaintiff and against the defendant company, which claimed a right to mine coal under the bed of the Waikato River because of its ownership of lands on both sides of the river, was on the basis that the river was a public navigable river and a highway. The first part of the headnote, sufficiently summarizing the judgments  
35 of the majority of the Court, sets out:

The presumption that a grant of land described as bounded by a river passes the bed of the river *ad medium filum aquae* is rebutted in the case of a grant from the Crown by the fact that the river is a public navigable (though non-tidal) river, subject to a public right of passage, the Crown, as trustee for the public, having an interest in the bed remaining public property, and the presumed intention to pass the bed being therefore negatived. The fact that the grant is a military grant, made under an Act passed for the purpose of confiscating Native land and making military settlements thereon, and that the river is the only practicable highway for military and other purposes, indicates  
40 that the Legislature, and therefore the Crown, in making the grant, had no intention that the bed of the river should be granted.

Hay, J., in *The King v. Morison* ([1950] N.Z.L.R. 247, 258, 260; [1949] G.L.R. 567, 571, 572), discussed the effect of this decision upon navigable rivers in New Zealand generally; and he referred to the  
50 importance in that case of the fact that the Waikato River was a public highway. In so doing, His Honour pointed out that it does not follow that all navigable rivers are public highways. All that I need say on this point, in connection with my consideration of the meaning of the phrase "for the purpose of navigation", is that it is to be taken from  
55 the cases that navigability of a river and its use as a highway are matters that go closely together.



I think I should say that my reference to *The King v. Morison* is solely for His Honour's discussion of the cases (*ibid.*, 258-260), and not so as in any way to express either agreement or disagreement with any view that may have been expressed, or even tentatively indicated, by His Honour on the questions before him. It is desirable that I should say this, as certain aspects of His Honour's judgment in that case may come under consideration in a case now pending before the Court of Appeal.\*

The English authorities dealing with navigation or navigable rivers do not, in general, assist in interpreting the phrase "for the purpose of navigation" in the section, because of the common-law definition of navigable rivers, which restricts those to tidal rivers. A right of navigation in a non-tidal river may, however, be obtained by user. In *Attorney-General v. Simpson* ([1901] 2 Ch. 671), where it was sought to establish a public right of navigation on a non-tidal river, *Farwell, J.*, at first instance, said: "The first issue which I have to determine is, whether the river is and has been from the earliest times, or, at any rate, a time anterior to the grant of the patent rights, a public navigable river. Now, the question whether a non-tidal river is navigable or not depends, not on the question of possibility of navigation, but on the proof of the fact of navigation. If the fact be proved, then the channel of the river is the King's highway, and as such is open to the free passage of all the subjects of the Crown." (*ibid.*, 687). While the judgment of *Farwell, J.*, was varied on appeal, it was, so far as this issue was concerned, upheld.

In *MacLaren v. Attorney-General for Quebec* ([1914] A.C. 258), the judgment of their Lordships of the Judicial Committee, refers to the economic use of a river in Quebec as a factor in the consideration of whether the river was "navigable". The judgment says: "There remains the important question whether the river Gatineau is a river which comes within the words 'navigable et flottable'. . . . This question is a mixture of fact and law. So far as fact is concerned the material for its decision consists mainly of the finding of the learned Judge at the trial that the 'river is floatable only for loose logs (flottable à bûches perdues), and that it is not floatable for cribs or rafts (flottable en trains ou radeaux),' which their Lordships accept in its entirety. In addition to this there are, of course, certain facts as to the magnitude of the Gatineau, the nature of its bed, and of the flow of water in it at various periods of the year. On these matters there is no dispute between the parties. The river bed is irregular and it varies greatly in breadth, so that in some places it is a wide river. The bulk of water that goes down it in times of freshet is very large, and at other times is comparatively small. Reaches in it may be navigated, but they are comparatively short, and it cannot be said that they affect the economic use of the river, excepting strictly locally, just as the extension of any other river into a lake, or the like, might give it a local usefulness. That such a river is not navigable is evident. . . ." (*ibid.*, 278).

In the United States, the common-law definition of "navigable river" has, in the various States, either not been adopted, or been adopted only in a modified form, because of the different circumstances prevailing from those in England. The cases are summarized in 3 *Bouvier's Law Dictionary*, 3rd Rev., 2301; and the summary, I

\*The reference is to *In re the Bed of the Wangonwi River*, reported ([1955] N.Z.L.R. 419).

think, shows the test of navigability in general adopted by the Courts to be the capacity of the river as a channel for the transport of goods, particularly the products of the country.

My opinion is that the words "for the purpose of navigation" in the definition in s. 206 of the Coal-mines Act, 1925, mean for economic purposes, such as the transport of goods for the purposes of commerce, agriculture, and the like. As a matter of interest, this meaning is, I think, consistent with the use of the phrase in the original section (s. 14 (2)) of the Coal-mines Act Amendment Act, 1903:

Susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public.

If the right of navigation contemplated by the definition in s. 206 is a public one, it is, in my view, for such purposes as a public highway is normally used for on land, which would include the transport of goods for the purposes mentioned. If, on the other hand, the right so contemplated is confined to the riparian residents and is, consequently, a right of way (*Orr Ewing v. Colquhoun*, (1877) 2 App. Cas. 839), it is still, in my view, a right of way for the like purposes. I think that this view receives some support from the choice that the definition makes of craft by which navigability is to be tested. Boats are of various kinds, and for various purposes, but barges and punts are primarily goods-carrying vessels, while rafts, if not rafts of logs being floated to a mill, seem to me also to be goods-carriers.

There is no evidence that the Waivhetu Stream now is, or ever has been, "used for the purpose of navigation" in the meaning that, I think, that expression bears. Neither the casual use of very small craft on the stream by persons, mostly, no doubt, boys, for the purposes of unorganized recreation, nor the use on it of the Hutt River Board's weed-cutting launch for its special purpose are, in my view, "for the purpose of navigation". As to whether the stream could be so used, though it has not been: in my opinion, neither in its original weed-choked condition was the stream, nor in its present condition (15 ft. to 16 ft. wide and deep enough for a launch drawing 14 in.) is the stream of sufficient width and depth to be "used for purpose of navigation", even by the shallow-draught craft mentioned in the definition. For those craft to be "used for the purpose of navigation" they must, in my view, be sufficiently large to be usable for the purposes I have indicated, and the width and depth of the stream must be such that they will be usable with their necessary means of propulsion when laden, as well as when unladen.

I, therefore, hold against the submission that the Stream is a navigable river within s. 206 of the Coal-mines Act, 1925.

The common-law presumption *ad medium filum* applies to a grant of land expressed to be bounded by a non-navigable river, unless sufficient appears in the words of the grant, or in the circumstances of the case, to rebut the presumption. It is unnecessary to refer to the many authorities, which show that the presumption applies in New Zealand. The mere fact that the title of the riparian owner is a Land-Transfer-Act title showing the boundary of the land as the bank of the stream, does not rebut the presumption: *District Land Registrar of Wellington v. Snow* (1909) 29 N.Z.L.R. 865, 869; 11 G.L.R. 733, 735), *Humphrey v. Burrell* ([1951] N.Z.L.R. 262, 267, per Gresson, J., at first instance, and, on appeal, per Sir Humphrey O'Leary, C.J., at p. 277 and *Stanton, J.*, at p. 280). Stress was laid on the inconvenience and difficulty that would be caused to the Hutt River Board if the

defendant should be held entitled to land that lies within the bed of the river, which land would be within and subject to the jurisdiction of the Board under s. 73 (1) of the River Boards Act, 1908. I am disposed to think that, having regard to the powers that River Boards have, the inconvenience and difficulty might not be as great as is anticipated. In any event, this consideration was not put forward as matter rebutting the presumption, nor, apart from s. 206 of the Coal-mines Act, 1925, was any matter put forward as doing so.

In my opinion, the presumption applies in this case.

The views I have expressed lead to the result that the plaintiffs may not have the injunction sought in para. (c) of their prayer, for, as was said by the learned editor of *Goodall's Conveyancing in New Zealand*, 2nd Ed., 719 (and I adopt this statement):

where the presumption *ad medium filium* does apply, and the accretion does not extend beyond the original middle-line of the stream (as it existed at the date of the grant), the applicant is not asking for anything which has not been his or his predecessors in title since the date of the grant.

But when it cannot be proved that the presumption *ad medium filium* applies, or when the accretion extends beyond the original middle-line of the river (as it existed at the date of the grant), then the applicant must rely on the doctrine of accretion.

The declaration sought in para. (b) of their prayer was, no doubt, asked for simply as a foundation for the order sought in para. (c). As the latter prayer fails, no declaration should be made on the former prayer: see *Earl of Dysart v. Hammerton and Company* ([1914] 1 Ch. 822, 834 per *Sir H. H. Cozens-Hardy*, M.R.). Further, any such declaration would, save as regards any part of the accretion claimed that might extend beyond the original middle-line of the stream, have no practical effect. I am inclined to think that no part of the accretion claimed does so extend, but, of course, I make no finding that it does not, as the evidence was not directed to this point. The point is of minor importance, and outside the matters that were discussed in the case, so that the possibility mentioned need not be considered as creating any real exception to the statement that any such declaration would have no practical effect. Even, then, if the declaration were not sought simply as a foundation for the order asked for in para. (c), I would, in exercise of the discretion conferred by s. 10 of the Declaratory Judgments Act, 1908, decline to make any declaration on this prayer.

It is desirable, in case I should be wrong in the view on the law that I have expressed, that I should state shortly my view on the facts relating to the question of accretion.

The evidence, speaking broadly, consists of first, a number of levels plans and plans showing work done in the stream; secondly, a number of survey plans from 1852 to the present time; thirdly, evidence as to texture of the soil on the accretion claimed; and fourthly, evidence of witnesses as to their knowledge of the accretion claimed, and the stream in its vicinity going back to varying times up to forty years or so ago.

The case for the plaintiffs is that the accretion claimed is not an accretion, but is the result of the work done by the River Board in cleaning out the stream of willows, weeds, and other obstructions over the period from about 1922, assisted by the dumping on the land claimed as accretion of some 415 cubic yards of quarry-spoil by the defendant, and some hundreds of cubic yards of rubbish from the river by the River Board. The case for the defendant is that the accretion claimed is

a true accretion formed largely before 1920, though, admittedly, the land has since then become higher and drier, on account of the operations of the River Board and the dumping of the spoil.

- The finding to be made depends, in part, on inferences to be drawn from the various plans, and, in part, on an evaluation of the verbal evidence. There is some conflict between certain witnesses, which conflict it is difficult to resolve as the witnesses are all worthy of credit. I refer, for instance, to an apparently definite conflict between Mr. Callender (the surveyor who prepared for the defendant the plan of the accretion claimed) and Mr. Searle (the River Board's foreman), both thoroughly reliable witnesses, as to the condition, whether dry land or swamp, in the latter end of 1950, of part of the accretion claimed. In this particular instance, I think that the conflict was resolved by the later evidence of Mr. Morrison, whose investigations in September, 1952, led him to a view that, had there not been the dumping of spoil on the land, part of the land in a crescent shape would have then been under water; so that, in my view, when Mr. Callender made his survey, either some of the spoil had been spread on the land—which he did not think was then the case—or else it happened that the stream must have been lower than usual.

- The general trend of the survey plans over the years—though this was not without an exception—was to show a narrowing of the space between the river-banks. Even without regard to the exception, I am not prepared to place undue weight on this, because there are, in fact, no defined banks, the land sloping very gently only to the water and the fixing of any line as that of the bank being arbitrary only. The levels plans, I think, are entitled to greater weight, prepared as they were for purposes much more closely connected with the question in this case.

- The soil surveys show on the accretion various amounts of foreign material at different points on the land claimed as accretion. Even allowing for a consolidation of one-third in the material dumped on the land, the quantity dumped would have raised materially the average level.

- The highest point above the present water-level of the land claimed as accretion is approximately 6 ft. 6 in. at hole No. 8 made by Mr. Morrison in his investigations made for the defendant. The natural material there was about 4 ft. 6 in. above the water-level, the difference of 2 ft. being due to filling. Of that 4 ft. 6 in., in my opinion, the evidence shows that something in the neighbourhood of 1 ft. 9 in. to 2 ft. is due to the drop in the water-level, caused not by imperceptible building-up of the land or retreat of the water, but by the cleaning-out operations of the River Board, which quickly lowered the water-level. Had it not been, then, for the River Board's cleaning-out operations, and the dumping of material, the highest point of the land claimed as accretion would now not be more than 2 ft. 6 in. to 2 ft. 9 in. above water.

- Relating that vertical height to the horizontal, I find that the greater part of the land claimed as accretion would now still be under water were it not for those causes; and a lesser part only (perhaps a quarter or a third) could be claimed to be true accretion. I do not say I am satisfied it is proved that even that lesser part is true accretion. While, before the District Land Registrar, if the application had to be based on the land being a true accretion, the burden of proof would, no doubt, rest on the applicant, in these proceedings the burden of proof does not

rest on her, but on the plaintiffs; and my finding is that the plaintiffs have not shown that a quarter or a third of the land claimed as accretion is not true accretion.

The plaintiffs, then, fail in their action and there will be judgment for the defendant. A counterclaim that was filed was not proceeded with. 5

From the whole of the foregoing judgment the plaintiffs appealed upon the ground that it was erroneous in fact and in law.

In the Court of Appeal,

*Solicitor-General, Evans*, Q.C., and *Haughey*, for the Attorney-General. 10  
*Cleury and Curtin*, for the Hutt River Board.  
*Wild*, for the respondent.

*Solicitor-General, Evans*, Q.C., for the Attorney-General as appellant (independently, as representing the Crown). The appeal by the Attorney-General independently as representing the Crown (as distinct 15 from his appearance as appellant *ex rel.* the Hutt River Board) involves only the claim for a declaration that the fee-simple title to the bed of the Waiwhetu Stream is vested in the Crown. The Crown's interest is in the general question of the interpretation of s. 206 of the Coal-mines Act, 1925, and its application to the Waiwhetu Stream. In particular, 20 the Crown, with respect, challenges *Hutchison*, J.'s, viewpoint that the words "for the purpose of navigation" in the definition of "navigable" "river" in s. 206 (2) of the Coal-mines Act, 1925 "mean for economic "purposes, such as the transport of goods for the purposes of commerce, agriculture, and the like" (*ante*, p. 419, l. 5). 25

As to the definition of the vital words used in s. 206 "navigation", "boat", "barge", "punt", and "raft": see the meanings of those words given in the *Oxford English Dictionary*, *Funk and Wagnall's New Standard Dictionary*, and *Webster's New International Dictionary*.

Comparing the language of s. 206 of the Coal-mines Act, 1925, with 30 that of the original section—namely, s. 14 of the Coal-mines Act Amendment Act, 1903—there has been a simplification of language, but no narrowing of meaning. The Coal-mines Act, 1925, was "An Act to consolidate and amend certain Enactments of the General Assembly relating to Coal-mines". The presumption is that no 35 alteration of the law was intended: *Maxwell on Interpretation of Statutes*, 10th Ed., 326; *Craies on Statute Law*, 5th Ed., 135.

Section 206 (1) provides that "the bed of such river shall remain 40 . . . vested in the Crown". As flooding at certain seasons, resulting from either rain or thaw, is a regular feature of many New Zealand rivers, the expression "fullest flow" in the definition of "bed" should be read in conjunction with the words "whether at all times so "or not" in the definition of "navigable river". If commercial use be the test, many very wide river-beds periodically under water from bank to bank would be outside the definition. The word "navigable" 45 does not necessarily mean navigable up as well as down the river: cf., the Clutha River.

The Coal-mines Acts of 1903, 1905, and 1908 referred to the beneficial use by the residents, actual or future, on its banks, or to the public. In the Coal-mines Act, 1925, this language has been replaced by the words "of sufficient width and depth . . . to be used for the purpose 50 "of navigation", etc.

Section 14 of the Coal-mines Act Amendment Act, 1903, was enacted presumably as a result of the decision in *Mueller v. Taupiri Coal-mines, Ltd.* (1900) 20 N.Z.L.R. 89; 3 G.L.R. 138 where the Court of Appeal held that the bed of the Waikato River was Crown land on the ground that the presumption that a grant of land, described as bounded by a river, passed the bed of the river *ad medium filum*, is rebutted in the case of a grant from the Crown by the fact that the river is a public navigable (though non-tidal) river, subject to a public right of passage, and that the Crown, as trustee for the public, has an interest in the bed remaining public property; and that the presumed intention to pass the bed is, therefore, negatived. *Sir Robert Stout, C.J.*, dissented from the result reached by the other members of the Court; and *Williams, J.*, doubted a view expressed by *Edwards, J.*, in relation to Native lands, and he also expressed a view as to "the only practicable highway". Apparently the Legislature thought that the Crown title to river-beds should rest on a sounder foundation than a deduction from a rebuttal, in special circumstances, of the *ad medium filum* presumption.

The enactment of s. 14 of the Coal-mines Act Amendment Act, 1903, was, in many senses, a revolutionary step. According to the common law of England, a river is not a "navigable river" unless it is also tidal: the *ad medium filum* presumption created by s. 14 applies to all non-tidal rivers. The policy of s. 14 was the creation of a statutory rule that the beds of all "navigable rivers" are to belong to the Crown, unless expressly granted by the Crown; and the expression, "navigable river", is defined in terms wide enough to include non-tidal as well as tidal rivers, and by reference to their width and depth. "Width and depth" are the only test, and the word "navigation" is to be defined in relation to that test. In applying that test, the Act specifies the kind of craft to be taken into consideration and "navigation" is used in its ordinary sense of the use of such craft for navigation according to the meanings set out in the dictionaries.

*Haughey*, in support. If the proper interpretation to be placed on s. 206 of the Coal-mines Act, 1925, is that proposed by the *Solicitor-General*, then sufficient evidence has been adduced in this case to show that the Waiwhetu Stream is *in fact* a navigable river for the purpose of that section. It follows that the stream-bed is vested in the Crown, although it is conceded that the respondent would have the right to obtain, as against the Crown, a good title to any land which she can establish has been formed as the result of a gradual and imperceptible accretion to her own land.

*Cleury*, for the Hunt River Board. The issues before the Court below were specified as follows:

- (a) Was the land to which title was claimed formed by accretion, as claimed by the respondent?
  - (b) Was it part of the bed of the stream as claimed by the appellant?
- On the hypothesis that the Waiwhetu Stream is not navigable:

A. In order that a riparian owner may gain a title by accretion, it is essential that the accretion should be so slow and gradual as to be in a practical sense imperceptible: *Humphrey v. Burrell* ([1951] N.Z.L.R. 262, 267, adopting the language used by *Lord Shaw* in *Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool), Ltd.* ([1915] A.C. 599, 613)).

B. The doctrine of accretion applies not only where the alluvium or deposit has been built up by natural causes, but also where artificial

works have assisted ; but the doctrine does not apply where land has been intentionally reclaimed : *Brighton and Hove General Gas Company v. Hove Bungalows, Ltd.* ([1924] 1 Ch. 372, 382-391), *Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool), Ltd.* ([1915] A.C. 599, 615).

C. It is clear from the findings of fact in the judgment (*ante*, p. 420, l. 39—p. 422, l. 5) that the respondent cannot claim that the doctrine of accretion applies to two-thirds or three-quarters of the area originally claimed as accretion and the learned Judge disallowed the respondent's claim as to that area. The finding (*ante*, p. 421, l. 48) is not disputed by the appellant or the respondent. It follows that the District Land Registrar's decision to issue a title for the whole area as accretion, gradual and imperceptible, was erroneous.

Putting aside the doctrine of accretion altogether, the respondent cannot assert, as against the Board, the right to the grant of a title to so much of the area as, in fact, is not true accretion. Whether or not the bed of the stream is vested in the Crown, the area of land in dispute now between the parties is one-third of the original area claimed by the respondent as accretion, and is now referred to as " the disputed area ".

D. To summarize the three operations or works in the river which are material to this case : (i) from 1922 onwards the Board periodically cleaned a channel in the stream by the removal of weeds. The weed-cutting machine operations in the main channel had the effect of causing a lowering of the water-level of up to 2 ft. immediately those operations were done. It was not a gradual retiral of those waters. (ii) In October, 1950, the respondent, against the Board's wishes, deposited spoil on the land claimed as accretion. (iii) In December, 1950, the Board deepened the channel and deposited spoil on the area claimed as accretion (*ante*, p. 421, l. 1).

E. The land which is not true accretion is still part of the bed of the stream, and the respondent is not entitled to the issue of a certificate of title in respect thereof. It is not disputed that, under the *ad medium filum* rule, the respondent has ownership of the bed of the stream to the mid-line thereof. The respondent's title shows a piece of land bounded by the Waiwhetu Stream (*ante*, p. 416, l. 47) ; and, in accordance with the *ad medium filum* presumption, that carried with it ownership in the bed of the stream to the middle line of the stream, but does not entitle the respondent to the grant of a certificate of title in respect of half the bed of the stream. Otherwise, every riparian owner on a non-navigable stream could, as a matter of right, ask for the issue of such a title.

[FAIR, J. : Was this argued in the lower Court ?]

It was probably argued that there was accretion by natural and imperceptible means, on the one hand, and accretion by man-made works, on the other hand ; the judgment does permit the respondent to obtain a title, and that can be based on the *ad medium filum* rule only ; but, under that rule, while there is ownership in the riparian owner, there is no right to the title to any portion of the bed of the stream : *In re White* (1927) 27 N.S.W.S.R. 129, 130, 131). His Honour has found that one-third of the land is true accretion. That necessarily means that it is dry land, and is no longer a part of the river ; and that is not disputed. There is ownership of a limited and special kind ; it is ownership that does not carry with it the issue of a title. The stream at all times remains the boundary, and the owner cannot require



a title to the bed of the stream to be issued in his favour. The respondent's right to a title must, therefore, rest on the ground that the disputed area has ceased to be part of the bed of the stream.

F. The question whether the land is or is not the bed of the stream is a mixed one of fact and law. The bed of a river is the land covered by ordinary freshes or floods: *Kingdon v. Hutt River Board* (1905) 25 N.Z.L.R. 145, 156-158; 7 G.L.R. 634, 636, 637 and *Palmerton North-Kairanga River Board v. Frost* ([1916] N.Z.L.R. 1110, 1118, 1119; [1916] G.L.R. 720, 724, 726). In *Kingdon's* case there were defined banks, presumably of some height. In *Frost's* case, as the river was the Manawatu, it may be assumed there were definite banks there. There are no defined banks to the Waiwhetu Stream (*ante*, p. 421, ll. 24-28); and it follows that any rise in the water in this stream by fresh or flood must necessarily mean that the water spreads over the land adjoining the ordinary channel.

*Solicitor-General, Evans*, Q.C., for the Crown: The practice of the District Land Registrar over a long period of time has been not to show anything on the certificate of title about water running over riparian land, for the reason that the *ad medium filum* line is indefinite. There have been expressions in some cases that the boundary of the land is to be shown on the title as in the bed of the stream, but in those cases the line was defined by metes and bounds based on fixed points on the riparian land. Two instances are the land bounded by the Waikanae River, north of Wellington, and land in the city of New Plymouth. In view of s. 206 of the Coal-mines Act, 1925, there is always another difficulty: whether the river-bed belongs to the Crown or is owned by the riparian owner. As to the *ad medium filum* rule, see *In re White* (1927) 27 N.S.W.S.R. 129, 130). The District Land Registrar, as the result of this case, will have a judicial decision to make, and he will be willing to make such an entry on the title as the decision in *White's* case prescribes.

*Cleary* continues. If the Court accepts the evidence that the 1950 flood was a normal flood, then that disposes of the matter; but, even if the Court thinks there was something exceptional about that flood, either the cessation of cleaning-operations or any freshes, or a combination of both, must substantially cover the disputed area.

G. The area, having formerly been part of the bed of the river, the onus is on the respondent to show that that position no longer continues, as she has asserted that the land had ceased to be part of the river: *Palmerton North-Kairanga River Board v. Frost* ([1916] N.Z.L.R. 1110, 1119; [1916] G.L.R. 720, 726).

H. The River Board has a limited proprietary interest in the bed of the stream, which is within and subject to the Board's jurisdiction under s. 73 of the River Boards Act, 1908: *Kingdon v. Hutt River Board* (1905) 25 N.Z.L.R. 145, 163, 164; 7 G.L.R. 634, 640 and *Ahikouka River Board v. Wairarapa South County* ([1926] N.Z.L.R. 182, 186, 187; [1926] G.L.R. 1, 4). If the respondent be issued with a title to "the disputed area" this result would follow: (i) If the Board entered on that area for the purpose of carrying out flood-protection works, it would be liable to pay compensation for any damage caused, notwithstanding the fact that expenditure of the Board's funds had created that disputed area: *River Boards Act, 1908*, s. 74. It would be anomalous if the Board, having by its operations and the expenditure of its funds enabled the respondent to acquire the land as a present,



were to be prevented from carrying out works on the land, save at the price of paying further moneys by way of compensation. For this reason, the Board regards the present case as involving an issue of importance on which a ruling of this Court should be obtained.

I. No authority is cited for the passage in the judgment (*ante*, 5 p. 419, l. 43-p. 420, l. 21) where His Honour deals with the legal position where the appellants claim for an injunction on the ground that, although the respondent was entitled to the disputed area as accretion, she was entitled to it under the *ad medium filum* doctrine.

[To STANTON, J.] It is difficult from the context to suggest there 10 was any other meaning than what plainly appears from the passage.

(a) There does not appear to be any case reported where title has been claimed under the *ad medium filum* rule to land which has been made by the expenditure of public moneys. In the precedent in *Goodall's Conveyancing in New Zealand*, 2nd. Ed., 651, from which 15 His Honour adopted a passage, the form of application for accretion is to be found in para. 2.

[To STANTON, J.] There is no form given for an application where it is based on something other than accretion.

(b) The passage does not distinguish between what are two separate 20 rights of a riparian owner whose land is shown as bounded by a stream : (i) the right of ownership of the bed to the middle line ; and (ii) the right to have a title to land up to the stream, but not extending into the bed of the stream. The former right is a limited one, with no interference with the bed if injury is caused to another riparian owner : 25 32 *Halsbury's Laws of England*, 2nd Ed., p. 601, para. 1055 ; and the owner cannot remove shingle which is the River Board's property : *Kingdon v. Hutt River Board* ( (1905) 25 N.Z.L.R. 145 ; 7 G.L.R. 634 ). The latter right is the right to have his title boundary defined as the shifting bank of the stream from time to time, but it is that shifting 30 bank which at all times remains his boundary, and he cannot encroach in to the bed of the stream ; and that follows from the nature of the *ad medium filum* rule : *In re White* ( (1927) 27 N.S.W.S.R. 129 ).

*Wild*, for the respondent. The history of s. 206 of the Coal-mines Act, 1925, shows that the attention of the Legislature has been directed 35 primarily to retaining property in coal rather than in the subsoil of rivers. The original s. 14 of the Coal-mines Act Amendment Act, 1903, amended the Coal-mines Act, 1891, which was " an Act to amend " the Law regulating the Granting of Coal-mine Leases and to make " Better Provision for the Regulation and Inspection of Coal-mines ". 40 Section 206 of the Coal-mines Act, 1925, refers to " minerals " as including coal. That statute consolidated and amended certain enactments relating to coal-mines. Section 206, which purports to deal with rights of property in land, does not find a place in statutes dealing with that topic, such as the Property Law Act, 1908, or the Crown Grants 45 Act, 1908 ( s. 35 of which deals with sea boundaries ), or even in the Public Works Act, 1928 ( s. 111 of which vests roads in the Crown, and Part VI of which deals with roads and rivers ).

As to the construction of s. 206 : as it purports to confiscate property, it will be strictly construed, on the presumption that, if the Legislature 50 intends to confiscate, it must manifest that intention plainly : *Maxwell on Interpretation of Statutes*, 10th Ed., 286 ; 31 *Halsbury's Laws of England*, 2nd Ed., p. 516, para. 671.

As to the judicial decisions on s. 206 : with the exception of *The*

- King v. Morison* ([1950] N.Z.L.R. 247 : [1949] G.L.R. 567), this is the first case in the fifty years of the history of this section in which either the Crown or the Court has raised the question of the applicability of s. 206, although there have been a number of reported cases affecting rivers to which the section would appear to have been more applicable: *The King v. Joyce* ( (1905) 25 N.Z.L.R. 78 : 7 G.L.R. 598, 661), as to which see *Goodall's Conveyancing in New Zealand*, 2nd Ed., 722, *Kingdon v. Rutt River Board* ( (1905) 25 N.Z.L.R. 145 : 7 G.L.R. 634), *District Land Registrar v. Snow* ( (1909) 29 N.Z.L.R. 865 : 11 G.L.R. 733), *Frost v. Kairanga-Palmerston North River Board* ([1916] N.Z.L.R. 643 : [1916] G.L.R. 392), *Ahikouka River Board v. Wairarapa South County* ([1926] N.Z.L.R. 182 : [1926] G.L.R. 1) and *Blenheim Borough and Wairau River Board v. British Pavements (Canterbury), Ltd.* ((1940) 3 N.Z.L.G.R. 243). In none of those cases, which are all the reported cases, was s. 206 raised either by the parties or by the Court. In *The King v. Morison* ([1950] N.Z.L.R. 247, 260, 1. 12 : [1949] G.L.R. 567, 572) *Hay, J.*, observed that it was singular to find the Crown upholding the *ad medium filum* rule in respect of the Wanganui River, but he did not decide the question.
- As to the saving clause at the beginning of s. 206 : even if the Waiwhetu Stream is a "navigable river", the bed has been granted by the Crown : and, therefore, s. 206 does not apply. (This point was not raised in the Court below.)

- (a) The presumption that the grant is *ad medium filum* applies in New Zealand and against the Crown, unless the terms of the grant or the circumstances of the case rebut the presumption : *Mueller v. Taupiri Coal-mines, Ltd.* ( (1900) 20 N.Z.L.R. 89 : 3 G.L.R. 138), *The King v. Joyce* ( (1905) 26 N.Z.L.R. 78 : 7 G.L.R. 598). (b) The mere fact that the grant does not in terms include the stream-bed, does not rebut the presumption : *The King v. Morison* ([1950] N.Z.L.R. 247, 257, ll. 8-21 : [1949] G.L.R. 567, 571, citing *MacLaren v. Attorney-General for Quebec*, [1914] A.C. 258, 272, and *Micklethwait v. Newlay Bridge Company*, (1886) 33 Ch.D. 133, 153). The original Crown grant, dated 1880, in favour of one Heath for an area of 105 acres including the whole of the area concerned in this case, is described as "bounded on the east by the Waiwhetu River". There is nothing in terms of that grant to exclude ownership *ad medium filum*.

- It may be said that s. 206, in using the word "granted", means "expressly" granted, as was suggested by *Hay, J.*, in *Morison's* case ([1950] N.Z.L.R. 247, 267, ll. 4-8 : [1949] G.L.R. 567, 576), and also in *Goodall's Conveyancing in New Zealand*, 2nd Ed., 718 ; but (i) the section does not use the word "expressly", and such a word cannot be read into a statute which is confiscatory ; and (ii) *MacLaren's* case and *Micklethwait's* case show that the grant does not need to be express.
- There is nothing in the surrounding circumstances here to indicate that the presumption does not apply. On the contrary, the character of the stream and the evidence of the then condition of the Waiwhetu Stream, justify the inference that it was of no value to the Crown at the time of the grant. That evidence shows there was nothing in the surrounding circumstances to rebut the presumption *ad medium filum* at that time. It follows that the saving clause applies, and the enacting part of s. 206 does not. The Waiwhetu Stream is not a "river", which is a general word presumed to be used in its popular sense : *Maxwell on Interpretation of Statutes*, 10th Ed., 54. The term "river" as used in s. 206 does not include a stream or a creek ; and the choice

of the word "river" alone is significant when contrasted with expressions used by the Legislature in other statutes, where the Legislature has always used the words "rivers", "streams", and "creeks", as meaning something different: see s. 1 of the Highways and Watercourses Divisions Act, 1858 ("rivers, streams or creeks"); the Public Works Act, 1928, Part VI (which deals with roads and rivers: see ss. 201-208); the River Boards Act, 1908, s. 73 ("rivers, streams, and watercourses"), and s. 77 ("river or stream"); and the Land Drainage Act, 1908, s. 2 ("all rivers, streams and channels through which waters flow"). Section 206 of the Coal-mines Act, 1925, by introducing the topic of navigability, leads to the inference that the Legislature was dealing with rivers as popularly understood, not with mere streams and creeks. The term "river", as used, contemplates a river with banks; in this case, His Honour said that "this stream" has no defined banks" (*ante*, p. 757, l. 24).

As to the phrase "navigable river": to fall within the scope of s. 206 a river must have been navigable at the date of the relevant Crown grant, or, alternatively, at the date of the passing of the Coal-mines Act Amendment Act, 1903 (November 23, 1903). There is no evidence whatever that the Waiwhetu Stream was navigable at either of those dates. Alternatively, the river must be "navigable" (within the definition) in its natural state; and s. 206 does not affect a river which is brought within the definition by the work of man, as distinct from natural causes: (a) the words "shall remain" are inconsistent with the change of ownership; (b) the words "continuously or periodically" (in the Coal-mines Act Amendment Act, 1903) and "whether at all times so or not" (in the Coal-mines Act, 1925) are appropriate to a river in its natural state: see *Coulson and Forbes on Waters and Land Drainage*, 6th Ed., 510; and *Sim E. Bak v. Any Yong Huat* ([1923] A.C. 429).

If regard is to be given to the *ad medium filum* rule, s. 206 cannot be read as entitling the Crown or a River Board, by cleaning and deepening operations, to gain ownership for the Crown at the expense of the riparian owner. If the stream is "navigable" now, it is only because of these deepening operations: reliance is placed on s. 206 (3), which is to the contrary. If the evidence establishes beyond doubt that the Waiwhetu Stream was originally non-navigable, then the *ad medium filum* applies and the owners own it to the middle line. The primary meaning of the word "navigation" is given in 2 *Shorter Oxford Dictionary*, 1314, as "the action of navigating; the action or practice of passing on water in ships or other vessels"; and see *Gardner, Locket and Hinton, Ltd. v. Doe* ([1906] 2 K.B. 171, 175).

The phrase, "for the purpose of navigation", means "navigation" "for economic purposes" as held by His Honour (*ante*, p. 755, l. 4), citing *MacLaren v. Attorney-General for Quebec* ([1914] A.C. 258); *Attorney-General of Quebec v. Fraser* (1906) 37 Can. S.C.R. 577, 597; 3 *Bowyer's Law Dictionary*, 3rd Rev., 2301; *Angell's Law of Watercourses*, 6th Ed., ch. 13, particularly p. 725; and 1 *Farnham on Waters*, 100-101; and His Honour's definition is adopted (*ante*, 755, l. 4). Alternatively, the phrase, "for the purpose of navigation", means a right of passage or right of way: *Orr Ewing v. Colquhoun* (1877) 2 App. Cas. 839, 846, 854, 868). The fact that the Waiwhetu Stream can be used for that purpose was not proved, and the evidence does not show that a continuous passage can be made along its course. The type of craft referred to in the evidence is not consistent with the use

of the river for use as a waterway. The finding of His Honour (*ante*, p. 419, ll. 26-30) was correct. Alternatively, the mere casual use for pleasure by craft of the type mentioned in evidence is not use "for the purpose of navigation": *Bourke v. Davis* (1889) 44 Ch.D. 110, 122, 125). The term "navigation" means something purposeful and definite, and not merely casual; and the word "navigable" implies that. [Refers to the evidence.]

As to the River Board's claim: The proper approach to any question of ownership relating to a non-navigable stream is on the basis of the *ad medium filum* rule: *The King v. Joyce* (1905) 25 N.Z.L.R. 78, 89-92; 7 G.L.R. 598, 600, 601). Ownership of the bed of a non-navigable stream is based on the rule that the riparian owner's property extends *ad medium filum*. Under the River Boards Act, 1908, the River Board has a limited property in the stream-bed, properly limited to such right as is necessary for carrying out its statutory functions: *Kingdon v. Hutt River Board* (1905) 25 N.Z.L.R. 145; 7 G.L.R. 634). That property or right of the Board does not include ownership, and is wholly irrespective of title: *Municipal Council of Sydney v. Young* ([1898] A.C. 457, 459) and *Finchley Electric Light Company v. Finchley Urban District Council* ([1903] 1 Ch. 437, 443, 444, 446), neither of which cases was referred to in *Kingdon's* case. Accordingly, the Board has no *locus standi* in an application by the respondent for title, even if the area claimed is river-bed. The matter concerns only the respondent and another riparian owner. The River Board is entirely unaffected by any question of title. If that submission is accepted by the Court, then it disposes of the River Board's case in this matter.

While there is a finding of fact that the disputed area would be under water but for the excavation and dumping, that finding necessarily includes the fact that the disputed area is now, and since December, 1950, has been dry land. (This is not disputed.) Though, in view of the finding that the disputed area is not true accretion (*i.e.*, as to two-thirds or three-quarters), the respondent cannot apply for title by accretion, she can nevertheless apply for title: Land Transfer Act, 1952, s. 81. Such an area may be "alluvion" or "dereliction": see *Byrne's Law Dictionary*, 47, 297-298; *Coulson and Forbes on Waters and Land Drainage*, 6th Ed., 116, and *The King v. Joyce* (1905) 25 N.Z.L.R. 78, 88; 7 G.L.R. 598, 599). In *re White* (1927) 27 N.S.W.S.R. 129, has no application here, for two reasons; the respondent is not applying for a title (*a*) *ad medium filum*, or (*b*) for land now under water.

The disputed area is dry land, and, neither in law nor in fact, is it stream-bed: *The King v. Joyce* (1905) 25 N.Z.L.R. 78, 115; 7 G.L.R. 598, 615) and *Kingdon v. Hutt River Board* (1905) 25 N.Z.L.R. 145, 149, 157, 158; 7 G.L.R. 634, 635-637). The evidence shows that the disputed area, and much more, would be covered by the 1950 flood; but that was shown to have been an exceptional flood. Apart from that flood of 1950, there is no evidence that the disputed area was covered by floods or even freshes.

[FAIR, J.; You have to establish your right before the District Land Registrar.]

It is open to the Court to say that the evidence as to flooding is insufficient, or was not specific enough; and maybe the Registrar may require further evidence on the matter. The evidence shows that the channel itself is not intended to remain where it is, *i.e.*, clear of the disputed area.

The onus to establish that the land is dry land is not on the respondent, who did not initiate this action. If the appellants want to stop her from applying for a title, the onus is on them. It is significant that no attempt was made by the River Board to show that in the two and a half years between December, 1950, and that date of hearing the disputed area had been subject to floods and freshes.

It has been contended that, because the River Board might wish to use the disputed area as a berm, then it is still river-bed. In view of the evidence and of the fact that the River Board itself built up the disputed area, it is unrealistic to claim that the disputed area is part of the stream-bed. The argument as to the possible use of the area as a berm was not raised in the Supreme Court, and is something of an afterthought based on unsatisfactory evidence. The area is land, and a berm is grass or a clearing: it is river-bank, and not part of the stream. The disputed area is now actually higher than what the Board would regard as a berm, and it is 33 ft. wide.

One of a riparian owner's most precious rights is the right of contact with water at its normal flow. To contend that the River Board can build up an area of dry land between an owner's title-boundary and the normal flow of water and deny the owner title thereto, would rob the owner of that contact. It would be contrary to the common-law rights of the riparian owner, and not warranted by the River Boards Act, 1908; see 33 *Halsbury's Laws of England*, 2nd Ed., pp. 558, 559, paras. 944, 946. The right of contact with the water is a right entirely distinct from the right of ownership *ad medium filum*: it arises *ex jure nature*, and is of importance to every riparian owner.

*Cleary*, in reply. The word "alluvion" means the deposit of soil that has been made; and "dereliction" means the retreat of the waters that give rise to the accretion. When counsel for the respondent speaks of obtaining title, there is one way, and one way only, in which the respondent can so obtain title otherwise than by accretion; and that is by the application of the *ad medium filum* rule.

Whether or not the River Board has a status in these proceedings or not, the intervention of the Board prevented the issue of a title to the respondent on the ground of accretion, which is now known to be erroneous as to two-thirds of the area claimed. It is established, and it is common ground, that River Boards have a special interest in the beds of rivers subject to their jurisdiction. That special interest has been described as a proprietary interest of a limited kind. It is of a very special kind. It may be singular in the legislation in New Zealand that such an interest is created by statute. A claim to a title to the bed of a river is ordinarily only a step towards the assertion by the riparian owner of some further rights founded upon the issue of the title. If Mr. *Wild's* argument is correct, the Board here is powerless to object to the issue of a title to the river-bed, although that title is obtained with the object of reclaiming land to the middle line and developing that land, by building or sub-dividing. In view of the statutory position of a River Board, such a result cannot be correct: *Municipal Council of Sydney v. Young* ([1898] A.C. 457) and *Finchley Electric Light Company v. Finchley Urban District Council* ([1903] 1 Ch. 437) are distinguishable.

If a riparian owner is not entitled to the issue of a certificate of title that encroaches into the bed of the stream, then the Attorney-General, in the public interest, is justified in restraining the issue of such a title.

Once the principle is accepted that normal floods or freshes are the

criterion for defining the extent of the bed, the matter becomes one of fact. The boundary is at all times the bed of the stream, and that is no denial of the landowner's rights.

The District Land Registrar cannot issue a title in circumstances  
5 such as this to any land that is, in effect, the bed of the stream.

[To STANTON, J.] He was at all times prepared to give notice to the Crown. It would be very desirable if the Registrar notified River Boards of any claim for title adjoining a stream. If there were some direction of that kind, the Registrar would be very glad to have it ;  
10 but, if this Court cannot be asked for such a direction, the remedy may have to be by legislation. In view of the special interest that a River Board has in the bed of a stream, it would be only proper that the Registrar should notify the River Boards of any claim which, either by accretion or under the *ad medium filum* rule, might affect the bed of the  
15 stream that is subject to the jurisdiction of the Board.

The question that arises here, so far as the Hutt River Board is concerned, is one that is common to, and a matter of concern to, the other River Boards throughout New Zealand.

*Solicitor-General, Evans, Q.C.*, in reply. Section 206 of the Coal  
20 Mines Act, 1925, must be considered in the light of s. 5 (d) of the Acts Interpretation Act, 1924. Section 206 (1), in its reference to a past grant of land and its reference to a future grant, is in two parts : one past, at the time of speaking ; and the other, future at the time of speaking. The test is the time when the land was originally granted  
25 by the Crown, or a future time when the land is to be granted to the Crown. In the present case, there is sufficient for the Court to assume that, up to the time when the changes began in 1948, there had been no substantial alteration in the course of the river. Whatever might be the depth of the water now, there is evidence that the depth is  
30 not so great now as formerly. Evidence as to the work done by the Hutt River Board shows that the effect of that work has been to lower the level of the water, and consequently, the depth of the stream. If that submission be not correct, the section would be useless. In every case there would be an application of the *ad medium filum* rule.

35 As to the expression "navigable river" as defined in s. 206 (2): the cases which have been cited on that expression were not decided under a statute such as the Coal-mines Act, 1925, with its precise definition of navigability. In *State of Tennessee v. West Tennessee Land Company* ( (1913) 127 Tenn. 575, 576 ; Am. Ann. Cas. 1914 B,  
40 1043, 1044) the water was obstructed by trees, but nevertheless the Court looked at the depth and navigability.

In the definition of "navigable river" in s. 206 (2) the words "by boats, barges, punts, or rafts" are words intended to describe the measure of the navigability because they are mentioned together.

45 The word "river" is used in the grant and on public maps on the respondent's deposited plan in the Land Transfer Office ; and, although the draftsman of the statement of claim used the word "stream", the word "stream" is capable of meaning any kind of watercourse : see the primary definition of the word "river" in 2  
50 *Shorter Oxford Dictionary*, 1744. The word "stream" is applied to those watercourses which come down hillsides, etc., and not to a steady, flowing river such as the Waiwhetu.

[FAIR, J. : I would be glad to know if the District Land Registrar

desires that this Court should state its opinion whether he should notify River Boards. It does not directly arise.]

He would like to have such an opinion of the Court, because it is consonant with justice; and, if there should appear to be any question whether or not the river is "navigable", the Crown should be notified.

As to the question of costs, the Crown submits to whatever terms as to costs the Court in its discretion might impose: *Attorney-General v. Sherborne Grammar School* (1854) 18 Beav. 256; 52 E.R. 101, *Attorney-General v. Huntingdon Corporation* (1821) Turn. and R. 329n; 37 E.R. 1127 and *Attorney-General v. Dove* (1823) Turn. and R. 328; 37 E.R. 1126).

*Cur. adv. vult.*

FAIR, J. The questions in issue in this appeal are stated in the judgment of my brother *Stanton* (*post*, p. 439), and it is unnecessary for me to restate them.

I agree with him that a number of the matters that were debated in argument do not call for decision. The questions as to the meaning and operation of s. 206 of the Coal-mines Act, 1925, and of the word "navigable" therein, are, in the context, and in the circumstances to which they are applicable, of very considerable difficulty. This is not lessened by the fact that the section is, in effect, a confiscatory provision, and, in accordance with the ordinary rules of interpretation, it must be confined to such matters as are clearly necessary to enable it to be given effective operation. The evidence as to the use of the river when s. 14 of the Coal-mines Act Amendment Act, 1903, was passed, is very scanty; and I agree that the Court should not decide whether this river falls within the scope of the section unless it is essential to do so.

But it seems to me quite unnecessary to decide this question in order to determine this action. If the river is a navigable river within the meaning of s. 206 of the Coal-mines Act, 1925, the bed is vested in the Crown, and, in accordance with the decision of the Privy Council in *Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool), Ltd.* ([1915] A.C. 599), the ownership of it remains the same, irrespective of reclamationary work by the respondent riparian owner. It is improbable, too, that even an alteration in the level of the normal flow and waters in the river, whether from natural causes or as a result of river improvement (apart from ordinary accretion), would affect the ownership of the lands comprising the bed when it passed to the Crown. It was admitted by the Crown that land formed by accretion would pass to the riparian owner, even in the case of a navigable river within s. 206.

If, on the other hand, this river-bed does not fall within s. 206 of the Coal-mines Act, 1925, or the corresponding sections which preceded it, then it seems quite clear from the decision of the Full Court in *Kingdon v. Hutt River Board* (1905) 25 N.Z.L.R. 145; 7 G.L.R. 634, followed in *Ahikouka River Board v. Wairarapa South County* ([1926] N.Z.L.R. 182; [1926] G.L.R. 1), that the bed of the river is vested in the appellant Board for all purposes of the River Boards Act, 1908, although the property which the Board has in the river-bed is limited to "such property and right only as is necessary for the carrying-out by the Board of its duties and jurisdiction as a River Board having the control and management of the said river under the said Act": *Kingdon v. Hutt River Board* (1905) 25 N.Z.L.R. 145, 165; 7 G.L.R. 634, 641).



It seems to be clear, also, that it is bound to refuse to consent to any dealing with the river-bed which, in the opinion of the Board, would be injurious to the course which the Board desires the river to take, or to any possible future operations in relation to its duties with regard to it.

So, if the bed is vested in the Crown, the basis of the respondent's claim to the issue of the title which she seeks to obtain seems without any legal justification. If, on the other hand, the bed is not vested in the Crown, but is owned by the riparian owners, the River Board's property in the bed, and its jurisdiction over it, are sufficient grounds for a refusal to amend the respondent's title, except to show the inclusion of the natural accretion which the learned trial Judge has found might be established by the evidence before the District Land Registrar.

These considerations in themselves seem sufficient to entitle the respondent Board to the declarations which *Stanton, J.*, proposes as the proper course in this case (*post*, p. 443, l. 37). They also strongly reinforce the obvious desirability of the general practice hitherto observed in New Zealand with regard to the boundaries of titles being shown as bounded by the bank of a river. Confirmation as to the desirability of this course is also found in the decision of the Full Court of New South Wales in *In re White* (1927) 27 N.S.W.S.R. 129).

I, therefore, agree that the proper course is for this Court to make the declarations proposed. I agree, too, that it is desirable that, in the future, River Boards, and adjoining riparian owners, should be notified by the District Land Registrar of similar applications in order that they may consider whether the granting of them is likely to be prejudicial to their interests, and be in a position to make representations thereon. I also agree to the costs proposed by him.

Since writing the above passages in my judgment, I have had the advantage of reading the judgment prepared by my learned brother *Adams* (*post*, p. 443), which examines a number of questions which *Stanton, J.*, and myself have not dealt with in detail. The members of the Court have reviewed and discussed the whole position at length on several occasions since; but I regret that I still find myself unable to agree with *F. B. Adams, J.*, on most of the matters so discussed; and it seems desirable that I should state my opinion on the questions upon which we differ.

The Crown's case was based entirely on a claim that it had been proved that this river was "navigable" within the meaning of s. 206 of the Coal-mines Act, 1925. This is a mixed question of fact and law: *MacLaren v. Attorney-General for Quebec* ([1914] A.C. 258, 278). The first step is to decide the meaning the word "navigable" bears in s. 206 of the Coal-mines Act, 1925. No doubt in one of its ordinary meanings it might extend to include use by small rowboats, skiffs, light punts used for pleasure, and other similar craft; but that is not its usual meaning, and the word "navigation" is not ordinarily used to describe the management of such craft, except when the word is used in a jocular manner. The section is, as I have said, confiscatory; and it is trite law, as well as good sense, that the operation of such laws is not to be extended beyond their plain and unambiguous meaning. Applying this principle to the facts of the present case, it is, at the very least, doubtful whether the word "navigable" in this context covers such slight, intermittent, and restricted use as that detailed in the evidence of the plaintiffs. Use for wider and different purposes, or



more definite evidence as to the river's susceptibility for use for such wider purposes, would, in my view, require to be proved to establish that the river was "navigable" within the meaning of this section. Moreover, in my view, on the same principle, the section properly applies only to such rivers as were "navigable" at the date of the Coal-mines Act Amendment Act, 1903. There was no evidence at all adduced at the hearing as to the nature of its use or condition at that date.

It seems to me, therefore, that the plaintiffs failed to prove that this river was "navigable" within the meaning of s. 206 of the Coal-mines Act, 1925, and the Crown's case accordingly fails.

It is unnecessary, and, I think, undesirable to attempt to give an exhaustive definition of the meaning of the word "navigable" as so used. Maybe it is restricted in much the way indicated by the learned trial Judge. It is possible, though, I think, unlikely, that it extends to rivers susceptible of beneficial use for the transport of residents on its banks, from place to place within a considerable stretch of the river. It may be that the greater part of any river requires to be "navigable" in order to include it within the section.

That the word "navigable" should not be given its widest meaning seems clear from the extreme improbability that the Legislature intended that the beds of every one of the innumerable streams in New Zealand which could be used for light pleasure craft, and for a considerable distance, should be vested in the Crown. An intention to effect so wide a confiscation of private rights, and so radical a departure from the common law governing such rights, without any necessity for it, or any appreciable advantage to the public, is so highly improbable and unreasonable that it is clearly, in my opinion, inadmissible. It seems to me so clear that the point does not require to be laboured.

The principle of construction, which requires the limitation of general words to a scope which is amply sufficient to effect the object and the purpose of the provision, requires, in my view, a restriction of the section to rivers likely to be of real use for commercial, or economic, or general purposes of transport. As I have said, it is, clearly, highly improbable that it was intended to include a shallow stream not likely, in the year 1903, to be of substantial use for these purposes.

Turning now to the construction of the enacting words of the section. Undoubtedly, it is rather difficult to construe owing to the inartificial way in which it is expressed—a feature not uncommon in legislation about that time. But *F. B. Adams, J.*, in his judgment, gives the widest possible meaning to the exception in the opening words of subs. (1) of s. 206 of the Coal-mines Act, 1925. The effect of this is so to limit the operation of the enacting words of subs. (1) as to render it (as indeed the learned Judge frankly recognizes) practically nugatory.

The draftsmanship of this section, and its preceding prototypes, is far from skillful; but, as the Privy Council said in *Salmon v. Duconcombe* (1886) 11 App. Cas. 627 where the main effect and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. In my view, neither of these conditions exists here.

On this somewhat difficult question of construction, reference may also be made to the judgment of *Barton, J.*, in *Weedon v. Davidson* (1907) 4 C.L.R. 895 in the course of which there occur the following passages: "But it is the practice, where the intention is quite clear,

“for Courts to modify the language of the Acts of Parliament to meet the intention. In *Maxwell on Statutes*, 4th Ed., at p. 344, the matter is put in this way:—‘Where the language of a Statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar; by giving an unusual meaning to particular words; by altering their collocation; by rejecting them altogether; or by interpolating other words; under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give the true intention. When the main object and intention of the Statute are clear, it must not be reduced to a nullity by the draftsman’s unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. The rules of grammar yield readily in such cases to those of common sense.’ . . . And the same author says, at p. 355:—‘Notwithstanding the general rule that full effect must be given to every word, if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather it should, be eliminated. The words of a Statute must be construed so as to give a sensible meaning to them if possible . . . This rule is not restricted to repugnancy. I find it again stated in *Maxwell on Statutes*, 4th Ed., at p. 380, thus:—‘It has been asserted that no modification of the language of a Statute is ever allowable in construction except to avoid an absurdity which appears to be so, not to the mind of the expositor merely, but to that of the Legislature; that is, when it takes the form of a repugnancy. In this case, the Legislature shows in one passage that it did not mean what its words signify in another; and a modification is therefore called for, and sanctioned beforehand, as it were, by the author. But the authorities do not appear to support this restricted view. They would seem rather to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention, and that his amendment probably does.’” (*ibid.*, 904-906).

The passages cited from the 4th Edition of *Maxwell on Interpretation of Statutes*, are repeated in the 10th Ed., 229, 230, 252.

It seems to me plain from the context in which the section is found—originally the Coal-mines Act Amendment Act, 1903 (which contained miscellaneous accompanying provisions relating to coal-mining), and the reference to minerals specifically mentioning only coal—that one of its main purposes was to give the Crown the right to minerals under the beds of rivers, at least in the case of rivers of a fair size. That being clearly one of its plain purposes, the Court must give effect to it if possible.

Maybe, the secondary object was to make such rivers available for river-traffic by adjoining residents likely to find it of considerable beneficial use. It is unnecessary to decide which of these purposes is

the main purpose of the provision, for, whichever it was, a strict and literal interpretation of the opening words will practically nullify the section. It appears from the general history of the litigation with regard to rivers, particularly the decision in *Mueller v. Tawipiri Coal-mines, Ltd.* (1900) 20 N.Z.L.R. 89; 3 G.L.R. 138 that probably the former reason was the dominant one, and that the second might well have been adverted to in a consideration of the factors considered in *Mueller's case*.

The duty to impose a restriction on wide general words such as the word "navigable", and the words of the opening exception, in the section, in order to avoid the provision operating unreasonably has repeatedly been emphasized. It has most recently been referred to, with the citation of the most cogent relevant authorities, in *Commissioner of Inland Revenue v. West-Walker* ([1954] N.Z.L.R. 191, in the judgment of North, J., at p. 220, and in my own judgment in the same case at p. 206, referring to the cases collected in the *Commercial Union Insurance Co., Ltd. v. Colonial Carrying Co. of New Zealand, Ltd.*, [1937] N.Z.L.R. 1041, 1048; [1937] G.L.R. 575, 578).

Another principle of construction seems to me, also to confirm this interpretation. A saving clause, if co-extensive with the enactment, and so repugnant, must give way to the enactment: *Craies on Statute Law*, 5th Ed., 204; 31 *Halsbury's Laws of England*, 2nd Ed., p. 484, para. 606; *Clelland v. Ker* (1843) 6 I. R. Eq. 35: aff. on app., *ibid.*, 288). *Blackburne, M.R.* says, "in a deed, the rule is that the exception must be of part of the thing only, and not of all—not of the greater part, or the effect of the thing granted: *Shep. Touch. 77; Dorrell v. Collins* (1582) Cro. Eliz. 6; 78 E.R. 273). Unless there were some reason or authority for adopting a different rule in the construction of a saving in an Act of Parliament, I should feel myself at liberty to act on it in the present case. But there is authority expressly warranting this rule of construction in an Act of Parliament: *Walsingham's case*, (1579) 2 Plow. 547, 565; 75 E.R. 805, 831; *Alton Wood's Case, Attorney-General v. Bushopp* ((1600) 1 Co. Rep. 40b 76 E.R. 189). Applying these authorities and this rule of construction to the exception in the sixth section, I had and have no doubt that it is repugnant to the enactment, and that the enactment "must prevail" (*ibid.*, 42). On appeal, the Lord Chancellor found that words had to be read into the revenue statute to carry out the intention of the Legislature, and read it accordingly as if they had been inserted (*ibid.*, 295, 297). The *Alton Woods Case* is approved and followed by *Fry, J.*, in *Yarmouth Corporation v. Simmons* (1878) 10 Ch.D. 518, 528), where he says, "a saving clause . . . which is repugnant to the body of the Act is void". Here the cause, and the necessity, of the Act's being made, a comparison of the several parts, its context, and the extraneous circumstances (including the large number of streams of all sizes in New Zealand), as well as the repeated re-enactment of the provision without alteration in its substance, seem to me, with respect, to negative the extremely restricted operation that the construction suggested in *F. B. Adams, J.'s*, judgment would impose on it as a result of the exception found in the opening words.

In my view, the only way in which the attainment of the object of the section according to "its true intent, meaning, and spirit" (Acts Interpretation Act, 1924, s. 5 (j)) can be achieved is by construing the word "granted" in the opening words as meaning "expressly or "by necessary implication granted", and by construing the general

words of the section as including, within its terms, the ownership of beds of navigable rivers which are vested in the owner by implication as a result of a general rule of law applicable to the grants of land shown as bordering on a river.

- 5 I do not find this construction the same "highly unreasonable and  
"unjust" result as my brother *Adams* thinks it (*post*, p. 454, l. 11).  
Where an exception has been made to the general rule of granting the  
bed by implication, and it has been expressly granted, or where cir-  
cumstances exist (apart from the common-law implication) that neces-  
sarily imply that the bed was included in the grant for a special reason,  
10 it does not appear to me unreasonable that such special cases should be  
excepted from the operation of the general provision. It seems reason-  
able that the new provision should operate only where there are no such  
special factors to indicate that the conditions relating to such rivers  
15 were exceptional.

- Subsection (3) of s. 206 of the Coal-mines Act, 1925, can, I think,  
be relied on in context, even if merely inserted (as it probably was)  
*ex cautela* as showing that when enacting the section, the Legislature  
had in mind the rights of riparian owners, and considered that such  
20 owners adjoining non-navigable rivers might think that their rights  
might be affected despite the definition of "navigable". The owner-  
ship of the bed of a river by the Crown clearly affects the riparian right  
wholly to divert the water from the bed within the owner's own bound-  
aries. Subsection (3), it seems, clearly indicates that the section was  
25 intended to affect riparian rights in navigable streams.

- Turning now to the independent and alternative question as to the  
discretion of the Court to decline to make the declaration asked for:  
although it is unnecessary to decide this, in view of the decision that it  
has not been proved that the river was "navigable", I think I should  
30 say that it seems to me that this power is inherent in the equitable  
jurisdiction of the Court in such cases as the present, for cumulative  
reasons (which I refer to later in detail). In this case, the Crown is  
really acting on behalf of the River Board, and it was separately heard  
only by the indulgence of the Court. The questions so raised, so far  
35 as it is concerned, were not alleged to be of any real or practical impor-  
tance to it in relation to this river. So far as the Crown is concerned,  
it is an abstract general question which the Court is asked to determine  
in the absence of evidence of any real weight as to the nature of the use  
of the river at the time of the passing of the Coal-mines Act Amendment  
40 Act, 1903, or at what might otherwise be the relevant date. That  
abstract questions of this type should not be decided by the Courts  
seems established by the authorities cited in my judgment in the  
*Commissioner of Inland Revenue v. West-Walker* ([1954] N.Z.L.R. 191,  
203) and in *Watson v. Miles* ([1953] N.Z.L.R. 958, 966, 974, 975). In  
45 terms, too, a declaration is asked for as to the ownership of the whole  
of the bed of the river for its full length. This issue involves the rights  
of a large number of riparian owners who were not represented in this  
action.

- The River Board, in my opinion, is in much the same position from  
50 an equitable point of view as the Crown is, since its rights must remain  
the same whether the ownership is in the Crown or in the riparian  
owners. Its position as to parties, and evidence, is the same as that  
of the Crown. It sought a decision of wide-reaching effect which seems  
unnecessary for the determination of the real issues between it and the  
55 defendant, and upon the scantiest of evidence.

That, in such circumstances, the Court's discretion may be exercised by refusing to make the order, even where the question is a vital one. seems indicated by the judgment of *Atkin, L.J.*, in *New York Life Insurance Company v. Public Trustee* ([1924] 2 Ch. 101, 119). He there deals with the undesirability of dealing with general questions of this kind in the absence of other interested parties—or a representative for them—such parties being in this case all the riparian owners to this river.

The injunction sought against the respondent's applying to the District Land Registrar for a certificate of title to land which he claims in his application to be his by reclamation and accretion, besides being ancillary to the main application is also one which, so far as this ground is concerned, is on the same footing as the application for a declaration. The River Board's rights can be amply safeguarded on the facts without a determination on s. 206 or the granting of an injunction. The Board seems in much the same position as the relator in *North Auckland Electric-power Board v. Wilson's (N.Z.) Portland Cement, Ltd.* ((1939) 3 N.Z.L.G.R. 133). *Johnston, J.*, cited *Ramsay v. Aberfoyle Manufacturing Co. (Australia) Proprietary, Ltd.* (1935) 54 C.L.R. 230) where it was said: "An Attorney-General's fiat does not entitle a relator to succeed on a somehow equity or no equity at all". The Board seems to me to have no equity at all to an injunction of this kind. Owing to these reasons, I regret I cannot agree that the Supreme Court was, or that this Court is, obliged to decide the question of the ownership of the bed of this river in this action, or grant any injunction.

Moreover, the respondent having abandoned her counterclaim, the Court should not make a declaration as to her rights, or decide the contention now advanced on her behalf that her certificate of title should be amended by showing the boundary of her land as the mid-line of the river. It seems to me that before so general a question should be considered, or decided, the District Land Registrar, or the Registrar-General of Land, would be a necessary party to the action, and that it is more than undesirable to decide this question in his absence. A decision in favour of the respondent's contention would involve a radical change in the practice of the Land Transfer Office which has been followed practically without exception from the institution of the Land Transfer system in New Zealand. A decision in her favour might result in all those certificates of title which show their boundaries as rivers requiring amendment, and so involve innumerable surveys and open a startling vista of litigation.

It seems to me that, before any decision is given effecting so novel and drastic a change, affecting so many individual rights, and possibly involving an immense amount of wholly unnecessary administrative work, the Registrar-General of Land is entitled to be heard. He is in a position to speak with more knowledge and experience of the relevant circumstances than any other person; and I feel most strongly that no declaration involving this radical change should be made in his absence and in the absence of a representative of other persons interested in respect of this river.

I regret to say that I cannot agree either that an alteration of the title in this way is authorized under s. 80 of the Land Transfer Act, 1952, or that this Court is entitled to give a decision on such a point in this action. The words of s. 80 itself, by the use of the words "as appears to him sufficient", make it plain that the discretion in regard

to such amendments is vested in the District Land Registrar of the district. It would appear to be an usurpation of his jurisdiction to rule upon the matter unless he himself so desires, and is heard in respect of it, or he has given a ruling which is challenged as given on a wrong principle or *malu fide*. It may well be that administrative requirements would entitle him, in view of the accepted practice, to refuse to regard the delineation of a boundary marked by a river-bank as an error or omission, and the Court would not interfere with such a decision : see the decision of the Full Court of Victoria in *Re Transfer of Land Statute, Ex parte Mutual Trust and Investment Society, Ltd.* (1885) 11 V.L.R. 166). For these reasons I think it highly undesirable to decide this question, especially as the counterclaim was abandoned in the Supreme Court and there was no request for that Court to decide it. It is true that it was raised for the respondent in this Court ; but I think that it is too late at this stage for it to be raised as one of the defences incidental to the claim. In any case, having regard to the dismissal of the Crown's case, it is unnecessary to decide it ; and, having regard to the absence of the District Land Registrar as a party, it is incumbent, I think, on the Court to decline to decide it, or to allow in the particular circumstances of this case any indulgence to be granted at this late stage to enable this question to be decided.

STANTON, J. This is an action in which Her Majesty's Attorney-General on behalf of the Crown, the Attorney-General on the relation of the Hutt River Board, and the Hutt River Board sought an injunction to prevent Nancy Blundell Leighton from obtaining the issue of a certificate of title to certain land on the bank, or in the bed, of the Waiwhetu Stream. It will be convenient to refer to the parties respectively as the Attorney-General, the River Board, and Mrs. Leighton. The action was heard by *Hutchison, J.*, who refused the plaintiffs any relief (*ante*, p. 416), and from that decision both the Attorney-General and the River Board have appealed.

Mrs. Leighton is the owner of an area of land bounded by the Waiwhetu Stream, and she had made application to the District Land Registrar for an amendment of her certificate of title so as to include therein an area of roughly a quarter of an acre of land in the bed of the Stream, which, she claimed, had been added to her land by accretion and the District Land Registrar had intimated that he proposed to accede to this application, but he refrained from proceeding to do so when the present action was launched. The objections pressed by the Attorney-General and the River Board were that the bed of the Stream was vested in the Crown under s. 206 of the Coal-mines Act, 1925, and that the area of land in question had not been formed by accretion but in part, at least, by actual reclamation. Mrs. Leighton contended, first, that the section in the Coal-mines Act, 1925, did not apply, as the Waiwhetu Stream was not a navigable river, and that even if accretion were not established, she was, by virtue of the presumption that her ownership included the bed of the stream *ad medium filum*, entitled to obtain a certificate of title to the land in question on the ground that it had now ceased to be part of the bed of the stream. The learned trial Judge held that both these contentions were well-founded and that, therefore, the action must be dismissed. He, however, set out as a finding of fact, that accretion had not been established except as to approximately one-quarter or one-third of the area claimed, and in this Court all parties accepted that finding as authoritative.

In this Court, the *Solicitor-General*, for the Attorney-General, submitted that the Waiwhetu Stream was a navigable river. Mr. Cleary, for the River Board, while accepting the submissions of the *Solicitor-General*, contended that, even if the stream were not a navigable river, Mrs. Leighton was not entitled to the issue of a certificate of title for the land claimed; and Mr. Wild, for Mrs. Leighton, contested both these propositions. 5

It was assumed that unless the stream was a navigable river, Mrs. Leighton was entitled to a portion of the bed of the stream to its middle line; and it was admitted that Mrs. Leighton could not now rely upon the doctrine of accretion as entitling her to a certificate of title for more than a small proportion of the area claimed; consequently, on this branch of the appeal, the discussion related to two matters only: first, was the claimed area still part of the bed of the stream, and second, if it was, could a certificate of title properly be issued to Mrs. Leighton 15 therefor. I propose to deal first with these two matters, and it will be convenient to deal with the second first.

The learned trial Judge, after a lengthy and careful hearing, found it difficult to decide what had been proved as to the way in which the disputed area had been built up, but it was apparent that a considerable amount of filling had been deposited on it, both by the River Board and by Mrs. Leighton, so that, in result, its level had been substantially raised by work which was in the nature of artificial reclamation; and it seems a legitimate inference that, but for such filling, it could not be claimed that this area had ceased to be part of the bed of the stream. 20 This conclusion seems to me implicit in the statement in the judgment that, but for the Board's cleaning operations and the dumping of material, "the greater part of the land claimed as accretion would now still be "under water," (*ante*, p. 421, l. 48). Mr. Wild was, therefore, driven to contend that when a riparian owner raises the soil in the bed of a stream by artificial reclamation so that an area of that bed is raised above the flow of the stream, she can, if the *ad medium filum* presumption applies, obtain a certificate of title for that area. This proposition was, in effect, accepted by the learned trial Judge, and he supported it by a quotation from *Goodall's Conveyancing in New Zealand*, 2nd Ed., 719, which is as follows: 30

"The importance of the foregoing is this, that where the presumption *ad medium filum* does apply, and the accretion does not extend beyond the original middle-line of the stream (as it existed at the date of the grant), the applicant is not asking for anything which has not been his or his predecessors in title since the date of the grant. 40

"But when it cannot be proved that the presumption *ad medium filum* applies, or when the accretion extends beyond the original middle-line of the river (as it existed at the date of the grant), then the applicant must rely on the doctrine of accretion." 45

Although there is a reference to an "applicant", the passage does not expressly relate to an application to have additional land included in a certificate of title, and, as Mr. Cleary pointed out, the only precedents given for such an application relate to land which has been formed by accretion properly so called. The only provisions in the Land Transfer Act, 1952, which appear to have any relevance are ss. 80 to 84, and these do not, in terms, give a registered proprietor any rights, but authorize the Registrar to correct errors and supply omissions in certificates of title, and to call upon any person holding a certificate of title which requires correction or which contains "any misdescription of 55 "land or of boundaries" to produce the title for the purpose of being



corrected. No doubt it has been the practice of Registrars to alter certificates of title on request, and to include therein any additional area due to accretion ; but I am not aware of any practice to add such an area because it has, by any other means—such as intentional reclamation—ceased to be part of the bed of a boundary-stream. Admittedly, it has not been the practice of Registrars to include in a certificate of title any part of the bed of such a stream, or any indication as to whether the registered proprietor had any interest in such bed ; and, so far as is known, the right of a registered proprietor entitled to the benefit of the *ad medium filum* rule to have any reference to those rights included in his title, has not been considered by any New Zealand Court. It was, however, considered by the Full Court of New South Wales in *In re White* ( 1927 ) 27 N.S.W.S.R. 129 where a landowner, on applying for a Land Transfer title, showed that he was entitled to an adjacent portion of the bed of a boundary-stream up to the middle line, and asked that that line should be shown on his title as his boundary. In refusing to accede to this request, *Street*, C.J., delivering the judgment of the Court, said : “ The rights of a riparian owner who is “ also the owner of the bed of a river to midstream are limited and are “ fairly well defined. He is not entitled to do anything to interfere “ with the natural flow of the stream to the injury of other riparian “ owners ; nor may he interfere with any rights that have been acquired “ by the public ; and his boundary is liable to be shifted from time to “ time by changes in the course of the river. I am clearly of opinion, “ therefore, that Mr. Manning’s contention that the applicants are “ entitled to have the line of midstream at the time of their application “ defined and described, and are entitled to the issue of absolute and “ indefeasible certificates of title to the soil within that fixed boundary “ so ascertained cannot be supported. I need not enlarge upon the “ difficulties and the anomalies that might arise in the future if such a “ right were conceded, and if the centre of the stream should afterwards “ become altered by reason of changes in the course of the river ” (*ibid.*, 130, 131).

With respect, I agree with this conclusion, and I think it is entirely applicable to our own Act. I also think that the limited nature of the riparian owner’s interest in the stream-bed affords strong ground for thinking that such an interest should not be converted into the full and indefeasible title indicated by a certificate of title, except for some cause, such as true accretion, which is capable of altering legal rights. In *Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool), Ltd.* ([1915] A.C. 599) Lord Shaw of Dunfermline, in delivering the judgment of the Judicial Committee of the Privy Council said : “ Artificial reclamation and natural silting up are, however, extremely “ different in their legal results ; the latter, if gradual and imperceptible “ in the sense already described, becomes an addition to the property “ of the adjoining land ; the former has not this result, and the property “ of the original foreshore thus suddenly altered by reclamatory work “ upon it remains as before, *i.e.*, in cases like the present, with the “ Crown ” (*ibid.*, 615).

In my view, these considerations apply with equal force to prohibit the conversion of a limited interest into a larger one—the largest known to our law—by acts of artificial reclamation. If this could be done for even a small portion of the stream-bed, it could be done with equal propriety right out to midstream, and if it could be done by one riparian owner, it could be done by several, or all, on both sides of the stream.



What, then, would happen to the stream and to the powers of the River Board over it? These considerations seem to me decisive against the contention put forward by Mr. *Wild*, that Mrs. Leighton should be able to obtain a certificate of title for this reclaimed land, even assuming that she is entitled to the (limited) ownership of the bed of the Waiwhetu Stream to its middle line, and that the area in question has ceased to be part of the stream-bed. It becomes unnecessary, therefore, to determine as a matter of fact, whether or not this land is still part of the bed of the stream; and I would add that the evidence adduced—no doubt owing to the fact that attention was mainly directed to the question of accretion—makes the determination of this factual matter undesirable in these proceedings.

The conclusion to which I have come also renders it unnecessary to determine whether or not s. 206 of the Coal-mines Act, 1925, applies to the Waiwhetu Stream, and the Attorney-General, in particular, may think, that, as this question was raised and argued, that the Attorney-General was admitted as a separate party for the purpose of its being determined, and the trial Judge has given a definitive ruling, the Court should proceed to a decision on it. However, it must be conceded that the evidence on the point is very scanty; and it seems to me undesirable that such a question should be determined by this Court, either as a matter of fact on insufficient evidence, or as a matter of principle without reference to actual facts. For myself, I would only say that I find the test suggested by the learned trial Judge—namely, that “for the purpose of navigation” (*ante*, p. 419, l. 4) means for economic purposes, such as the transport of goods—does not afford much assistance in determining whether any particular stream has the requisite width and depth, to bring it within the section. What would seem to be envisaged is such a width and depth as would be sufficient to allow the boats or other craft mentioned to pass over a sufficiently continuous length of water as to justify one in saying that the stream, or a substantial and continuous portion of it, was available for the passage of any of the craft mentioned.

It may be added that any decision on this matter might affect the interests of all riparian proprietors on this stream, but, if in favour of the Crown, it would not bind such other proprietors, and the matter might again be litigated with a different result.

There is another aspect of the matter that was not argued. If this stream is navigable, not only within s. 206 of the Coal-mines Act, 1925, but in the ordinary sense, this may be a relevant circumstance to consider in determining whether the *ad medium filum* rule applies to its riparian landowners: see *Mueller v. Taupiri Coal-mines Ltd.* (1900) 20 N.Z.L.R. 89; 3 G.L.R. 138) and *The King v. Joyce* (1905) 25 N.Z.L.R. 78, 91; 7 G.L.R. 598, 601).

The question as to the advisability of giving a decision on matters other than those dealt with in this judgment, has been fully canvassed by *Fair, J.*, (*ante*, p. 432) and I do not desire to add anything to what he has said.

The appeal must be allowed, but there remains the question of what should be the form of the judgment in the action. The statement of claim asks for:

- (a) A declaration that the fee-simple title to the said stream-bed is vested in the Crown.
- (b) A declaration that the building-up of that portion of the stream-bed mentioned in paragraph 4 hereof . . . is not due to accretion but is the result of artificial works.

- (c) An order restraining the defendant from applying for the issue of a Land Transfer title in respect of such land.
- (d) The costs of and incidental to this action.
- (e) Such further or other relief as to this Honourable Court may seem just.
- 5 As to (a), as already intimated no declaration will be made. As to (b), there will be a declaration that the building-up of that portion of the bed of the Waiwhetu Stream mentioned in para. 5 of the amended statement of claim is not wholly due to accretion, but is, as to the major portion thereof, the result of artificial works. As to (c), there will be  
10 a declaration that the respondent is not entitled to the issue of a certificate of title for the land already mentioned, but this determination is without prejudice to the respondent's right to apply for and obtain a certificate of title for so much of the said land as she may be able to show has been built-up by accretion. Notice of any such application  
15 is to be given to the Attorney-General and the River Board. In the circumstances, a declaration rather than an order seems the more appropriate.

Arising out of the matter last mentioned, there are two matters upon which the Attorney-General intimated that the District Land  
20 Registrar desired an expression of opinion from this Court. While it may be outside our province to give any directions to the District Land Registrar, it is felt that the facts which emerged in the course of these proceedings make it desirable that, in all cases where application is made for the addition of any portion of the bed of a stream to a  
25 riparian owner's title, notice of such application should be given both to the Crown and to any River Board exercising jurisdiction over the stream. A further matter mentioned was as to whether a statement should be inserted in certificates of title for land bounded by a stream, as to whether the riparian owner is entitled to the bed of the stream  
30 to its middle line. The Court in *In re White* (1927) 27 N.S.W.S.L. 129, was of opinion that this should be done; but, having regard to the established practice, the provisions of s. 206 of the Coal-mines Act, 1925, the provisions of the River Boards Act, 1908, and also the possibility of difficulties arising under s. 35 of the Crown Grants Act, 1908,  
35 as to "creeks", I do not think the practice is a suitable one for adoption in New Zealand.

The appeal will be allowed, with costs to the River Board only on the middle scale, with an additional allowance of sixteen guineas for the second day of hearing and seven guineas a day for second counsel for  
40 two days, together with disbursements. In the Supreme Court, judgment must be entered for the River Board with such costs as that Court considers appropriate.

F. B. ADAMS, J. I am not satisfied that this case is adequately  
45 disposed of by the declarations proposed by my brethren, and feel, with respect, that too many of the problems that arise are left undecided. The purpose of the litigation is to determine the rights of the three parties now before the Court in respect of a small parcel of land; and much money and effort have been expended towards that end. In  
50 my opinion, the parties are entitled to have their controversy determined by decision of the Court both as to the ownership of the land, and as to the respondent's right (if any) to a certificate of title. The learned Judge left undecided the question of fact whether there is any part of the land that can be properly claimed by the respondent as an accretion  
55 to her title, and counsel did not invite us to examine that question.

They did not invite us to relegate it, as my brethren propose, to the District Land Registrar—a course which is, in my opinion, open to serious objection, both because of the difficulty of the question, and also because the parties have sought, and should get, a judicial decision. That question, if it requires to be decided, should be referred back to the Supreme Court for decision, either upon the evidence already adduced, or, if any party so desires, and the Court thinks fit, upon further evidence, or by means of an inquiry. Except for that particular issue, I can see no reason why all the questions arising in the case should not be disposed of finally by our judgment. My brethren, on the other hand, are content with two declarations, the first of which merely records a negative finding of fact by the learned trial Judge to the effect that the respondent had not established a title by way of accretion to the whole of the land she claimed—a finding which was not challenged in the argument before us—while the second rejects the respondent's claim to a certificate of title extending *usque ad medium filum aquae*—but without determining whether her title so extends—and relegates to the District Land Registrar the question referred to above, which the parties have already endeavoured to litigate fully in the Supreme Court. The claim of the Crown to the bed of the stream is left undecided, and the learned Judge's decision that the respondent is entitled *ad medium filum* is displaced, though never challenged by counsel in this Court; and the question is left at large on the ground that the evidence is insufficient, though none of the parties has made any suggestion to that effect, or expressed any desire to seek or adduce further evidence.

For my part, and with all respect to the different view of my brethren, I deem it proper to consider all the matters that seem necessary to a final decision. But, before discussing them, I advert briefly to some of the reasons given for refraining from decision.

We are not called upon to determine the rights of the Crown and the River Board as against riparian owners, over the full length of this river, and no one could reasonably suggest that we should do so in these proceedings. The mere fact that a decision of this Court may establish principles of law that will, indirectly and by way of precedent only, affect the rights of other owners of riparian lands upon the banks of this stream, is no ground for refusing relief in the particular case. This is a familiar characteristic of the decisions of this Court, and it is a novel suggestion that the Court should stay its hand in regard to the particular piece of land now in question, merely because the owners of other riparian lands are not before it.

As for the discretion of the Court to grant or refuse relief by way of declaration, I find it difficult to envisage—apart from relief by injunction, such as was also claimed—what other form of relief the parties could have sought in this case in order to have their controversy settled. But adequate relief by way of declaration, whether with or without injunction, is, in my opinion, appropriate and ought not to be refused. The parties are entitled to have their problem solved, and any declaration that might be made must, of course, be limited to the particular piece of land and can bind only the parties to this action.

Then there is the further suggestion that the evidence on some of the issues is scanty. Once again, the idea is novel. Where issue has been duly joined, and where the parties have put before the Court such evidence as they deem sufficient in support of their respective cases—and perhaps, for all the Court may know, all the relevant evidence obtainable—the duty of the Court is to decide the case on the evidence

submitted, even though it may suspect that more or better evidence might be procurable. In the words of *Lord Moulton* in *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* ([1914] A.C. 461) where an issue—in that case, it was a defence of illegality—is duly raised on the pleadings, the Court is entitled to assume that it has before it in evidence all the relevant surrounding circumstances; and, if any be missing, it is the party's own fault, and he must take the consequences.

"In such a case the legal motto, *de non apparentibus, et de non existentibus eadem est ratio*, is rightly applied" (*ibid.*, 476). In other words, the Court must act upon the evidence placed before it, and, if the evidence be inadequate, must determine the case by reference to the burden of proof.

In the present case, the parties have strenuously argued the relevant questions, and no counsel has invited us to exercise a discretion to refuse relief by way of declaration, or has raised any question as to the rights of other riparian owners, or made any suggestion that further evidence could or should be procured.

I turn now to the substantive issues. The proceedings arose out of an application by the respondent to the District Land Registrar, made under what is now s. 80 of the Land Transfer Act, 1952. That section reads:

The Registrar may, upon such evidence as appears to him sufficient, subject to any regulations under this Act, correct errors and supply omissions in certificates of title or in the register, or in any entry therein, and may call in any outstanding instrument of title for that purpose.

Obviously the power conferred by this section needs to be exercised with the utmost caution in order to ensure that no injustice is done to persons unaware of the proceedings; and, in my opinion, where it is proposed to deal with any litigable question by proceedings under the section, the Registrar should decline to act unless, and until, all proper opportunities for litigation have been given. I certainly agree with what has been said as to the desirability of notifying the Crown and River Boards in cases like the present.

The land in respect of which the respondent sought a certificate of title was delineated on a plan by metes and bounds. The whole of the land was claimed as an accretion; but, both in the Court below and in the argument before us, it was also contended that the land belonged to the respondent by virtue of the well-known presumption that a title to land bounded by a river extends *usque ad medium filum aquae*. The learned Judge upheld this latter contention, rejecting the contention advanced on behalf of the Attorney-General that the bed of the stream as a whole is vested in the Crown by virtue of s. 206 of the Coal-mines Act, 1925, and stating that the Hunt River Board's contention, based on s. 73 (1) of the River Boards Act, 1908, was not put forward as matter rebutting the presumption. He held, accordingly, that the appellants were not entitled to the injunction they claimed; and I understand his judgment as deciding that the respondent had established her right to a certificate of title *usque ad medium filum aquae*. The learned Judge went on, very properly, to express his view on the facts as to the alleged accretion. He held that the greater part of the land claimed as accretion could not be so claimed, but, while not satisfied that any part of it was true accretion, considered that the respondent might be able to establish such a claim in regard to an undefined portion amounting to about one-quarter or one-third of the land she had claimed.

At the hearing before us, Mr. *Wild* said that he did not dispute the

finding that not more than one-third of the land originally claimed could be regarded as a true accretion. I express no opinion as to whether there is any true accretion or what its extent may be ; but, as to the existence or extent of any accretion, I have no doubt that, irrespective of the form of the proceedings, the onus rests, as Mr. *Cleary* contended, on the respondent as the party asserting the affirmative of that issue in regard to land which was admittedly, at one time, part of the bed of the river. 5

Mr. *Wild* also said that his client is not applying for a title extending *ad medium filum aquae*. But he relied, nevertheless, on the *ad medium filum* presumption in order to justify the respondent's claim to a certificate of title for the whole of the land in question (that is to say, the whole of the land originally claimed as accretion) as being hers by virtue of the presumption. The proposition that the respondent owns the bed of the river *ad medium filum*, unless her title to it is affected by s. 206 of the Coal-mines Act, 1925, or by the provisions of the River Boards Act, 1908, was not disputed by counsel for the appellants; and the first suggestion to the contrary appears in the judgments of my brethren. 10 15

In my opinion, apart from the statutory provisions just mentioned, 20 the respondent is entitled *ad medium filum aquae*, and there is no reason why this undisputed proposition should not be accepted. As for the material available to support the finding, the presumption itself is enough in the absence of rebutting evidence ; and there is no rebutting evidence. Learned counsel for the appellants did not suggest that 25 any such evidence could be adduced, or that they had any desire to investigate the matter further ; and, with such eminent and experienced counsel, one may properly assume that they acted deliberately and advisedly. Moreover, I see no reason for supposing that they overlooked any matters that could have been put in evidence in order to 30 rebut the presumption.

My brother *Stanton* makes the suggestion, admittedly not raised in argument, that, if the stream is navigable, not only within s. 206 but also in the ordinary sense, this circumstance may be relevant to the application of the presumption ; and he cites *Mueller v. Taupiri Coal-mines, Ltd.* ( (1900) 20 N.Z.L.R. 89 ; 3 G.L.R. 138) and the dictum of *Williams, J.*, in *The King v. Joyce* ( (1905) 25 N.Z.L.R. 78, 90, 91 ; 7 G.L.R. 598, 600, 601) to the effect that navigability will rebut the presumption, and that the earlier case had established the rule that the presumption does not apply to navigable rivers. With all due deference 40 to *Williams, J.*, that dictum is scarcely a correct summary even of his own judgment in the former case, and certainly does not represent the *ratio decidendi* of the Court. As was correctly said by *Chapman, J.*, in *The King v. Joyce*, the former case " was decided on what may be " termed an accumulation of circumstances which were held to negative 45 " the presumption " (*ibid.*, 115 ; 615). Navigability was, no doubt, one of those circumstances ; but to have held it sufficient in itself would have been contrary to the well-established rule of the common law : see, for example, *Orr Ewing v. Colquhoun* ( (1877) 2 App. Cas. 839). With respect, there is no doubt whatever that the presumption applies even to navigable rivers. As was said by *Lord Maugham*, in delivering the judgment of the Judicial Committee in *St. Francis Hydro Electric Co., Ltd. v. The King* ( (1937) 2 All E.R. 541, 543), the presumption of law applies to a non-tidal river " whether the river were navigable or " not." There is, in any event, no evidence in this case of navigability 55 at common law.

I suspect that *Mueller v. Taupiri Coal-mines, Ltd.* (1900) 20 N.Z.L.R. 89; 3 G.L.R. 138) may have given rise to an inclination to treat the presumption as a curious and anomalous rule, fraught with doubt, and requiring great caution in its application. In my opinion, it is not. It is a tool for the everyday use of conveyancers and Courts, the essence of the matter being that it is applicable as a matter of routine in every case where sufficiently strong rebutting circumstances are not proved to exist. Whether the rule be a good or a bad one may be a different question; but, while it remains part of our law, it is not to be whittled down to a tenuous uncertainty. I have no hesitation in doing as counsel did and treating it as applicable here, subject only to the possible effect of the statutes already mentioned.

Before proceeding to a consideration of the matters that were actually debated before us, I think it desirable to state my views as to the nature of a river boundary and some matters connected therewith, my conclusions being much influenced by those views.

There is a broad distinction between a water boundary, whether it be the sea or an inland river or stream, and a boundary defined by metes and bounds. Wherever I speak of a river boundary, or of land bounded by a river, or use any similar expression, I refer only to a true water boundary. Whether the boundary is of the one kind or the other depends on the construction of the grant, or, in the case of land under the Land Transfer Act, of the certificate of title or other relevant document. I am not to be understood as suggesting that lands bordering upon a river cannot have a fixed boundary along the line of the river. There may, undoubtedly, be such a boundary if it lies within the power of the grantor to confer it. Such a boundary was possible at common law, and is equally possible under the Land Transfer Act. It is perhaps desirable to add that there is nothing in the Land Transfer Act to prevent land bounded by water from being described by reference to such water-boundary, and that, in such cases, the boundary must necessarily be of the same nature as a similar boundary created by a common-law grant. In the present case, the respondent has a Land Transfer title to a piece of land comprising 36 pp., more or less. This piece of land was included in an area of 105 acres granted by the Crown to a predecessor in title of the respondent on January 22, 1880, "to hold unto [the grantee] his heirs and assigns for ever as from the 5th day of "October 1840." In that grant, the land was described as "bounded " . . . towards the east by a road line and the Waiwetu River," and the marginal plan shows the eastern boundary as being a public road (now the Old Wainui Road) down to a point near to the situation of the respondent's land, and thence as the "Waiwetu River." There can be no doubt that, as a matter of construction, the boundary of the respondent's land under this grant was a river or water boundary.

It is exactly the sort of boundary that was considered in *MacLaren v. Attorney-General for Quebec* ([1914] A.C. 258, 270) and was there held, notwithstanding some references to posts and stone boundaries, to make the land "riparian" or "bounded by the river" (see also *Secretary of State for India v. Foucar and Co., Ltd.* (1933) 50 T.L.R. 241) and *Wolfe v. British Columbia Electric Railway Co., Ltd.* ([1949] 3 D.L.R. 319, 321). The distinction between such a river boundary, and a boundary defined by metes and bounds was clearly drawn by *Cooper, J.*, in *Strang v. Russell* (1905) 24 N.Z.L.R. 916, 925, 926). In the case of a river boundary, the boundary may be variously stated as being the river, or the water, or the bank of the river; but the meaning

is always the same. Where there is a defined river-bank, the line is not the top of the bank, but the line to which the water comes, *Clarke v. City of Edmonton* ([1929] 4 D.L.R. 1010, 1024), the reference being, of course, to the line of the water when it exactly fills the bed in a normal flood or fresh; and a river boundary of this kind is also the boundary of the bed. 5

I understand that the land comprised in the respondent's certificate of title first appeared as a separate lot in Deposited Plan No. 9966, dated July, 1930. Her certificate of title is not before us; but, according to the pleadings, the land is described therein by reference to this plan; and, no doubt, the plan on the certificate of title is a copy of the relevant portion of Plan No. 9966. Plan No. 9966 shows the south-eastern boundary as being the "Waiwetu River". There are no measurements or bearings shown along the boundary, and it is simply a curved line purporting to be the edge of the river. In my opinion, this is a river boundary of the kind described above. Indeed, it could be none other, because, in the absence of any further grant from the Crown, there could be no right to any other boundary. I can see no reason for supposing that the common-law principles applicable to a river boundary do not apply in their full extent to land under the Land Transfer Act, in cases where, as in the present instance, the land is described as being bounded by a river. 10 15 20

A river consists of the water, the bed, and the banks—the banks being the outermost parts of the bed on either side, and the bed being the ground covered by the water at its fullest flow in ordinary floods: 25 *Coulson and Forbes on Waters and Land Drainage*, 6th Ed., 96. The bank is the line which divides the bed from the adjacent lands. It is well established that the boundary-line of lands bounded by water is not a fixed and unchanging line, but one that shifts or fluctuates in accordance with the natural changes in the position of the bed occurring by gradual and imperceptible processes. If the bed gradually encroaches by erosion, or gradually withdraws by deposit of alluvion, or by recession of the waters, the boundary shifts accordingly. Such boundaries "fluctuate in law as well as in fact:" per *Lindley, L.J.*, in *Hindson v. Ashby* ([1896] 2 Ch. 1, 11), citing *Scrutton v. Brown* ((1825) 4 B. and C. 485; 107 E.R. 1140). The last-mentioned case dealt with encroachment by the sea, the owner of the foreshore being held to possess "a moveable 30 "freehold . . . a certain quantity of land shifting in situation" (*ibid.*, 498; 1145); and, as *Bayley, J.*, there said: "That must be the "case of land fronting the sea or a river, where, from time to time, the "sea or river encroaches or retires. If the sea leaves a parcel of land, 40 "the piece left belongs to the person to whom the shore there belongs " . . . The Crown by a grant of the sea-shore would convey, not "that which at the time of the grant is between the high and low-water "marks, but that which from time to time shall be between those two 45 "termini. Where the grantee has a freehold in that which the Crown "grants, his freehold shifts as the sea recedes or encroaches . . . I "think that . . . as the high and low-water marks shift, the "property conveyed by the deed also shifts" (*ibid.*).

Reference may also be made to *In re Hull and Selby Railway* ((1839) 5 M. & W. 327; 151 E.R. 139) another case dealing with the foreshore; but the principle is the same as in the case of a river.

In *Foster v. Wright* ((1878) 4 C.P.D. 438) a river had, by gradual and imperceptible process, shifted from its original bed till it eventually encroached upon certain lands which had formerly lain at some distance 55



from the river, and were bounded otherwise than by the river. The question was whether the defendant, as owner of this land, was entitled to fish in the waters covering what had admittedly been his land, or whether the plaintiff, as the owner of an exclusive right of fishery in the river, could maintain an action of trespass against him for so fishing. *Lindley, J.* (as he then was) held that the fishery carried with it the ownership of the soil of the bed, and said: "If he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title" (*ibid.*, 448). *Lord Coleridge, L.C.J.*, was not satisfied that the right of the soil went with the fishery, but agreed that, if it were so, the legal consequences would be as stated by *Lindley, J.* In *Hindson v. Ashby* ([1896] 2 Ch. 1, 12), *Lindley, L.J.*, said that he "might perhaps have gone too far" in one part of his judgment in *Foster v. Wright* ( (1878) 4 C.P.D. 438), but I think this had reference to his opinion that the doctrine of accretion applies even where the old boundaries can still be ascertained.

The last-mentioned question has given rise to some difference of opinion (*Hindson v. Ashby*), but seems now to be settled, so far as we are concerned, by the decision of the Privy Council in *Secretary of State for India v. Foucar and Co., Ltd* ( (1933) 50 T.L.R. 241, 243), where it was specifically held that the principle of accretion applies even where the former boundaries are known, or are capable of ascertainment. Their Lordships, indeed, were of opinion that it applies even in the case of a "bounding grant", that is to say, "one confined by specific boundaries represented by the lines drawn on the attached plans" —which I understand as meaning that such a delimitation of the boundary will not affect the construction of the grant in this respect so long as, on the true construction, the river is the boundary. In the present case, there is no such delimitation of the boundary; and the river is clearly the boundary, both in the Crown grant and in the certificate of title.

In my opinion, this conception of a shifting boundary and a movable freehold dominates the whole subject. When the physical river-bed shifts by natural and imperceptible process, the boundary shifts accordingly, and the freeholds in the bed and in the riparian lands shrink, or expand, as the case may be. The title to the bed will follow the movements of the bed; and, with all deference to a dictum of *Williams, J.*, to the contrary in *The King v. Joyce* ( (1905) 25 N.Z.L.R. 78, 94; 7 G.L.R. 598, 603) the *medium filum* of the river must fluctuate in the same way, being at all times the middle line of what is, for the time being, the bed of the river: *Earl of Zetland v. Glover Incorporation of Perth* ( (1870) L.R. 2 Sc. & Div. 70). In this, I follow what is said in the passage quoted by my brother *Stanton* from *In re White* ( (1927) 27 N.S.W.S.R. 129) (*ante*, p. 441, l. 18), and differ respectfully from the passage he quotes from *Goodall's Conveyancing in New Zealand*, 2nd Ed., 719, where the learned author speaks of "the original middle line of the stream (as it existed at the date of the grant)". I admit, of course, that, as a matter of conveyancing, grants and titles may be so expressed as to give boundaries that are fixed once and for all; but, as already stated, I am dealing only with true water boundaries.

If the respondent's land had never been brought under the Land



Transfer Act, her rights in respect of accretion would have depended upon the Crown grant and the common law. Any true accretion would, in my opinion, have belonged to her, not as something over and above what was conveyed to her by the Crown grant, but as part and parcel of the land so conveyed. As was said in *Secretary of State for India v. Fowar and Co., Ltd.* ((1933) 50 T.L.R. 241): "It is not that their Lordships are asked to presume that additional lands were granted by the Crown, but only that the Crown made grants which might be either added to or diminished by the water. The chance was inherent in the grant. The river gives, just as it may take away, and if the gift is gradual, little by little, from day to day, or from week to week, the law for the reasons explained above deems what is added to have been part of what was granted" (*ibid.*, 243).

At common law, therefore, any accretion would have vested in the respondent by force of the grant as being land within the boundary fixed thereby. In my opinion, the fact that the respondent's land is now under the Land Transfer Act, makes no difference in principle. In *Auty v. Thompson* ((1903) 5 G.L.R. 541), *Edwards, J.*, held, without doubt, that accretions to land brought about by alteration in the course of a stream followed, and were held under a Land Transfer title, saying that "the land grows by imperceptible degrees" (*ibid.*, 543, 544). His decision was followed in converse circumstances in *Ferrall v. Nott* ((1939) 39 N.S.W.S.R. 89, 99). In that case, the bed and shores of Sydney Harbour up to high-water mark being vested in a public authority by statute and held by it under a certificate of title issued by direction of the statute, *Nicholas, J.*, held that the boundary was "ambulatory"; and that the doctrine of accretion applied in favour of an owner of lands fronting the harbour. In *District Land Registrar of Wellington v. Snow* ((1909) 29 N.Z.L.R. 865; 11 G.L.R. 733), a case of erosion, the point that "the river boundary moved with the erosion" was taken by the eminent counsel appearing for the appellant, but was not mentioned in the judgments, presumably because the question whether title to the eroded land had been lost was regarded as depending on the doubtful question whether the title extended *ad medium filum aquae*. In *Humphrey v. Burrell* ((1951) N.Z.L.R. 262) the first two of the foregoing decisions were accepted by *Sir Humphrey O'Leary, C.J.*, and *Stanton, J.*, as authority for the proposition that, when accretion or erosion takes place, an owner holding under a Land Transfer title becomes entitled to more or less land than is evidenced by his certificate of title. In other words, the boundary shifts.

Turning to the *ad medium filum* rule, *District Land Registrar of Wellington v. Snow* ((1909) 29 N.Z.L.R. 865; 11 G.L.R. 733) may, I think, be regarded as sufficient authority for the proposition that a certificate of title to land described as bounded by a river will, unless the presumption is rebutted, carry the title to the middle line of the river. The Court held that the relevant questions of fact as to the application of the presumption could not be determined in those proceedings; but it was certainly assumed that, subject to those questions, the presumption would apply. In outlining the difficulties presented, the Court went behind the certificate of title and referred to the question whether the original Crown grant would include the half of the bed. In *In re White* ((1927) 27 N.S.W.S.R. 129)—discussed below—the question whether the presumption would apply in the case of a certificate of title which contained no reference to the middle line did not arise and was not considered. The decision there that a person bringing

land under the Act and entitled *ad medium filum* is entitled to have that right recorded on the title, is not inconsistent with the view, apparently adopted by the Court of Appeal in *District Land Registrar of Wellington v. Snow* that the right will survive though not recorded on the title.

5 On principle, I can see no ground for supposing that a certificate of title describing land as bounded by a river is to be construed any differently from a common-law grant in similar terms. Accordingly, I agree with the learned trial Judge's view that the presumption is not rebutted by the fact that the respondent holds under a Land Transfer title.

10 I think it follows that the common-law principles outlined above apply in their full extent to land under the Land Transfer Act in cases where, as here, the land is described as being bounded by a river.

I turn now to the contention of counsel for the appellants based on s. 206 of the Coal-mines Act, 1925 (quoted below). This was relied  
15 on partly in answer to the respondent's claim that she owns the bed of the river *ad medium filum*, and partly in answer to her claim of accretion. The learned *Solicitor-General* argued that, in any case where the section applies, if the bed of the river shifts, "the new bed does not become, "but the old bed always remains" the property of the Crown. If  
20 so, and if s. 206 applies, the respondent can gain nothing by accretion.

In my opinion, the doctrine of the movable nature of the freehold in the bed of a river must be applied to s. 206, with the result that the titles of the Crown and of the riparian owners will shift as the position of the bed changes by imperceptible processes of accretion and erosion.

25 In this, I am in accord with the learned author of *Goodall's Conveyancing in New Zealand*, 2nd Ed., 720. It follows that s. 206 is irrelevant in regard to accretions. In other respects its interpretation presents serious difficulties.

Before stating my views on the section, I think it right to say that  
30 the differences of opinion which emerge between my brother *Fair* and me, in its interpretation, appear to spring from a fundamental difference in our approach to the task. I cannot add to this judgment by citing authorities; but, in my opinion, the paramount rule to be observed in the construction of a statute is that the text, as a whole, is to be  
35 read in its ordinary and natural meaning, and, unless there be ambiguity or repugnancy, or the result be absurd or unjust, without speculation as to the probable or possible intentions of the Legislature *31 Halsbury's Laws of England*, 2nd Ed., 482, 483, 491, 497, 498, 499, 506, 507. If there are exceptions to that rule, they are applicable only in exceptional  
40 cases; and, in general, the intention must be ascertained from the text. The law is not, and can never be, an exact science; but it should approximate as closely thereto as is reasonably possible, and departure from the rule in question renders exactitude, or precision, impossible.

45 Section 206 of the Coal-mines Act, 1925, reads as follows:

(1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property  
50 of the Crown.

(2) For the purpose of this section—

"Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:

"Navigable river" means a river of sufficient width and depth  
55 (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.

(3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

This enactment first appeared as s. 14 of the Coal-mines Act Amendment Act, 1903, re-enacted unchanged in s. 3 of the Coal-mines Act, 1905, and in s. 3 of the Coal-mines Act, 1908. In those three statutes the wording was as above, except for the definition of "navigable river," which appeared therein in the following form : 5

"Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts. 10

It will be seen that "continuously or periodically" has now become "whether at all times so or not" and that the reference to use by "residents . . . on its banks," as well as by "the public," has disappeared. But, in regard to user, the words that remain are perfectly general, and, on their face, would apply to residents on the banks and to all other persons whomsoever. It is difficult to see any practical difference between the two formulae, and it is unlikely that, in a section of this kind, a change of meaning was intended. I suspect that, as Mr. Evans contended, the draftsman of the Coal-mines Act, 1925, was merely saving words and aiming at simplification without change of meaning, and intended neither to narrow nor to enlarge the scope of the section. To narrow it might be an abandonment *pro tanto* of lands theretofore vested in the Crown, while to enlarge it might be an encroachment upon titles previously vested in subjects. An alteration of wording does not necessarily imply a change of meaning: *Maxwell on Interpretation of Statutes*, 9th Ed., 326, and *Craies on Statute Law*, 5th Ed., 135. 15 20 25

The learned Judge has, so to speak, segregated the phrase "for the purpose of navigation," thus bringing the word "navigation" into strong emphasis as the key to the meaning; and he interpreted it as connoting "economic purposes such as the transport of goods for the purposes of commerce, agriculture, and the like" (*ante*, p. 419, l. 5). With respect, this reads into the statute a limitation to economic user which is not expressed, and which is not, in my opinion, necessarily implied. To my mind, the emphasis rests, not so much on the word "navigation" as on the words "by boats, barges, punts, or rafts." The envisaged purpose is "navigation by boats, barges, punts, or rafts" and, wherever such craft are used for their proper purposes, there is, I think, "navigation" by boats, barges, punts, or rafts. There may be a problem in determining what are "boats", "barges", "punts", and "rafts" respectively; but, when that problem is solved, all that remains in this particular connection, is the question whether such means of passage or conveyance can be used with normal and reasonable facility. In regard to the meaning of "boats", I prefer to reserve my opinion, but, as at present advised, would not be disposed to limit the word to boats used commercially, or to depart in any other way from whatever may be the natural and ordinary meaning of the word. 30 35 40 45

My brother Stanton finds the learned Judge's suggestion unhelpful, and suggests as possibly preferable the view that there must be "a sufficiently continuous length of water" fit for the specified use (*ante*, p. 442, l. 30). My brother Fair, on the other hand, says nothing about that, but makes some other suggestions as to possible meanings, and is of opinion that the word "navigable" cannot have "its widest meaning" (*ante*, p. 434, l. 20). The differing suggestions of the 50 55

trial Judge and my respected brethren illustrate the difficulty that so commonly arises upon any attempt to depart from the literal meaning of a statute. In the present instance, the statute itself defines the term "navigable river", and it is a little difficult to understand why  
5 a further definition of navigability should be sought. I am inclined to think, however, that, as my brother *Stanton*, suggests, the length of water available may be a relevant consideration, and that there must be sufficient length for normal and reasonable use of one or more of the specified kinds of craft. For instance, if rowing boats are "boats",  
10 it would not be enough that one could be rowed a few yards up or down the stream if the limits were such that no sensible person would want to do so. That would not be "navigation" within the meaning of that word as used in the statutory definition.

I agree that the evidence as to navigability is scanty. But this  
15 may be because no more evidence is available. It is not a question of actual user but of capacity for use; and to me it seems reasonably clear that the stream could be used by rowing boats and that, if rowing boats are "boats," it may accordingly be navigable within the meaning of the Act. As will appear, however, a decision on the question of  
20 navigability is unnecessary to my judgment.

Mr. *Wild* contended, and I think rightly, that s. 206 of the Coal-mines Act, 1925, has no application in this case because of the saving clause with which it opens. In a passage in his judgment in *The King v. Morison* ([1950] N.Z.L.R. 247, 267, l. 8; [1949] G.L.R. 567, 576) *Hay, J.*,  
25 in explaining the section (but without any decision on the point), inserted the word "expressly" before the word "granted," as if the opening words were "Save where the bed of a navigable river is or has been  
"expressly granted by the Crown . . .", and the learned author of *Goodall's Conveyancing in New Zealand*, 2nd Ed., 718, also suggests  
30 that the section must "presumably" be read as meaning "expressly granted." Mr. *Wild* submitted that no such implication should be made.

There has been considerable speculation as to the purpose for which s. 206 of the Coal-mines Act, 1925, was enacted; but, whatever may  
35 have been its purpose, the opening words, "Save where the bed of a "navigable river is or has been granted by the Crown," were obviously intended to be dominant. There was to be no interference with grants theretofore or thereafter made. This was natural in a section which, so far (if at all) as it might be confiscatory, made no provision for com-  
40 pensation. An unjust intention is not to be attributed lightly to the Legislature in the absence of clear words, and particularly where the Legislature seems to have been at some pains to avoid injustice. I am strongly of opinion that the opening words of s. 206 are not to be departed from in any sense whatever unless one is compelled to that  
45 course by the clear expression of a contrary intention elsewhere in the section. Even if one were forced in the end to regard the section as merely declaratory, that view must be accepted in preference to any confiscatory interpretation which would, contrary to the opening words, interfere with grants actually made by the Crown.

50 The suggestion is, of course, that, where title to the bed of a stream passes by virtue of the *ad medium filum* presumption, it is not "expressly" granted. But the word "expressly" is one of considerable ambiguity, as witness my own decision in *Burton v. McGregor* ([1953] N.Z.L.R. 487) as compared with the contrary and contempor-  
55 aneous decision of *Durves, J.*, in *In re Langston* ([1953] P. 100; [1953]

1 All E.R. 928). A thing may be "expressed" by implication :  
*Viscountess Rhondda's Claim* ([1922] 2 A.C. 339, 371). The learned  
*Solicitor-General* was no doubt conscious of this difficulty when he  
 suggested the alternative formula, "expressly or by necessary implication  
 "other than the presumption *ad medium filum*". He would admit  
 all other implications, while rejecting the one selected implication.  
 Once again we see the difficulties and uncertainties that arise when an  
 attempt is made to qualify the words of a statute.

Now, on the supposition that the words of the section are to be  
 qualified as suggested, the intention attributed to the Legislature is  
 the highly unreasonable and unjust one of leaving untouched any grant  
 in which the bed has been "expressly" mentioned, but of confiscating  
 the bed without compensation in any case where it has in fact been  
 granted but the words of the grant do not "expressly" mention the  
 bed. Why should the Legislature draw such an arbitrary distinction?  
 Or, rather, why should such an arbitrary intention be attributed to the  
 Legislature when the words it has used, if taken at their face value,  
 are absolutely general and apply to every grant?

The only answer I can see is the suggestion that the dominant purpose  
 of the section was to negative, in cases coming within it, the rebuttable  
 presumption that a grant of land bounded by a river is a grant of the  
 land *usque ad medium filum aquae*. But, if this were the real and  
 dominant purpose, is it conceivable that the section should have been  
 drawn as it is and without any mention of the presumption? For  
 my part, I cannot conceive that a draftsman proceeding to express that  
 intention could have been so inept as to express himself in the words  
 of s. 206.

Where the presumption applies, the portion of the bed to its middle  
 line is included in the grant just as much as is the land expressly des-  
 cribed; and the grantee takes that portion of the bed by force of the  
 grant and because the grant is construed as including it. As was said  
 by Kay, J., in the well-known passage in *Tilbury v. Silva* (1890)  
 45 Ch.D. 98): "It is a law of conveyancing that, *prima facie*, where  
 "a man grants land on the bank of a river, having himself the soil *ad*  
 "*medium filum*, without any words describing the boundary to be the  
 "*medium filum*, the soil *ad medium filum* passes by the grant . . .  
 "It is a law by which you ascertain the parcel of a grant. It does not  
 "matter whether the land is copyhold, freehold, or leasehold. If it  
 "be bounded by a river, and the grantor has the soil *ad medium filum*  
 "of the river, you presume, in the absence of evidence to the contrary,  
 "that the soil *ad medium filum* of the river passes by the grant" (*ibid.*,  
 108, 109).

Accordingly, wherever there is a Crown grant to which the pres-  
 umption applies, the portion of the bed *ad medium filum* has, in the  
 words of s. 206 of the Coal-mines Act, 1925, been "granted by the  
 "Crown"; and it has been so granted as fully and truly as the other  
 lands comprised in the grant. It is irrelevant that rebutting circum-  
 stances may show that no portion of the bed was, in fact, included in  
 the grant. If the bed passes at all, it passes because it is granted, this  
 being the meaning of the grant.

The only possible answer to this argument is that, if it be accepted,  
 it is difficult to find the purpose for which s. 206 was enacted. At  
 common law, so it is said, the beds of rivers in New Zealand have always  
 and necessarily been vested in the Crown, except where the Crown has  
 granted them away; and, therefore, unless the section is construed as

confiscating the bed in the case of grants that operate by virtue of the presumption, it does not change the law. The underlying assumption is that the Legislature must necessarily have intended to alter the law—an assumption which I am not prepared to accept. Declaratory enactments are by no means uncommon.

I am not satisfied that, even on the view I take of it, s. 206 is merely declaratory. In *The King v. Morison* ([1950] N.Z.L.R. 247, 267; [1949] G.L.R. 567, 576), *Hay, J.*, construed it as depriving the Wanganni Maoris of their customary rights in respect of the bed of the Wanganni River; and, in enacting s. 36 of the Maori Purposes Act, 1951, the Legislature proceeded on the assumption that s. 206 (or, more correctly, its predecessor of 1903) had destroyed those customary rights. In the recent *Wanganui River* case ([1955] N.Z.L.R. 419), it was unnecessary for the Court of Appeal to consider the accuracy of that view, which was, nevertheless, the underlying assumption on which the proceedings then before the Court, were based. Although I took part in that decision, and expressed the view that the section would no doubt prevent the granting of freehold orders in favour of Maoris, the consideration which I have been compelled to give to s. 206 in the present case has led me to doubt that underlying assumption. I now think it arguable that a freehold order may be a "grant" within the meaning of s. 206. But, whether the matter be open to doubt or not, there is the fact that *Hay, J.*, and the Legislature, have attributed to s. 206 a particular legislative effect which would prevent it from being regarded as merely declaratory even if, as I hold, the saving words protect grants operating *ad medium filum* by virtue of the presumption.

There is the further possibility that the section may prevent the raising of a claim to any part of the bed of a navigable river on the ground of adverse possession as against the Crown for sixty years or more. As it happens, I now have such a claim in hand for decision, though, in the case, of a river not alleged to be navigable. There is the further possibility that s. 206 was intended, in part at least, to take the beds of navigable rivers out of the scope of such statutory provisions as s. 78 of the River Boards Act, 1908. It may well have been thought desirable, in regard to navigable rivers, to provide that the titles to their beds should, notwithstanding those provisions, remain and be deemed to have always been vested in the Crown in cases where the beds have not been granted away. Finally, the Coal-mines Act is an odd place in which to find a general provision as to the beds of navigable rivers, and one is led to wonder whether the section may not possess a purpose related to the enactment in which it appears, as, for instance, to ensure that the coal under the beds of such rivers should be available for the purposes of the Act.

For these and other reasons I am far from convinced that the section is merely declaratory. But there is no reason why it should not be so, and it is not incumbent on the Court to find an interpretation which would make it other than declaratory. It may well have been passed *ex abundanti cautela* in order to set at rest some supposed doubt as to the law. There would be nothing startling in that; and, for my part, if the fair and natural construction of its opening words reduces the section to the declaratory level, I would prefer to accept it as such, rather than to give it a more specific efficacy by doing violence to the opening words in order to produce an unjust and almost cynically arbitrary result. Whatever else may be uncertain, I think it is certain that the Legislature did not intend to revoke existing grants, limiting

its action to grants which operated as such by virtue of the *ad medium filum* rule and revoking those without compensation, while, at the same time, leaving other grants untouched. The words it has used do not bear that meaning, but, on the contrary, expressly protect all grants.

There is a curious circumstance to which I have not as yet referred. The operative words are "shall remain and shall be deemed to have "always been vested in the Crown". There are no words purporting to vest or divest anything. The words "shall remain" look to the future, and the other words look back to the past, and there are no words operative in *praesenti* such as one would expect to find if the purpose were to divest interests already alienated from the Crown and to re-vest them in the Crown. This is the sort of thing one expects in a declaratory enactment; and, in my opinion, the wording tells strongly against the theory that any divesting of private rights already acquired was intended.

There is ample authority for the view that statutes derogating from common-law rights must be expressed in clear and unambiguous language: *31 Halsbury's Laws of England*, 2nd Ed., 502. The same rule applies to confiscation without compensation (*ibid.*, 504); and, if two interpretations are open, the one that leads to injustice should be rejected (*ibid.*, 506, 507). I emphasize that the question here is whether, in spite of the clear words of the saving clause, the respondent's title to the bed has been confiscated without compensation; and I find nothing that would induce me so to hold.

I have not overlooked subs. (3) of s. 206 of the Coal-mines Act, 1925. It is in the nature of a proviso. As the section could not conceivably affect the rights of riparian owners in respect of the beds of non-navigable rivers, it is an obvious instance of a proviso intended to quiet the fears of persons unnecessarily apprehensive: *Maxwell on Interpretation of Statutes*, 9th Ed., 166. It seems to assume that subs. (1) does in some way "prejudice or affect the rights of riparian owners" in respect of the beds of navigable rivers. But if, on its true construction, subs. (1) has no such effect, that construction is not to be departed from in order to give an operative meaning to the proviso. In *West Derby Union v. Metropolitan Life Assurance Society* ([1897] A.C. 647), where a somewhat similar question arose, Lord Herschell, whose views were concurred in by Lord Shand and Lord Davey, said: "If I thought the proviso as senseless as has been suggested, supposing the construction I put upon the Act is adopted, I should come to the same conclusion, and I think any other conclusion would be in the highest degree dangerous. I decline to read into any enactment words which are not to be found there, and which would alter its operative effect, because of provisions to be found in any proviso" (*ibid.*, 655). Lord Davey summed the matter up by referring to: "... the old and apparently ineradicable fallacy of importing "into an enactment, which is expressed in clear and apparently unambiguous language, something which is not contained in it, by what is called implication from the language of a proviso which may or may not have a meaning of its own" (*ibid.*, 657). Lord Watson's statement of the principle (*ibid.*, 652) was approved by Viscount Maugham in *Jennings v. Kelly* ([1940] A.C. 206, 218; [1939] 4 All E.R. 464, 470) and the principle does not infringe the rule there laid down that enactment, saving clause, and proviso are to be construed as a whole, "each portion throwing light, if need be, on the rest". I emphasize the words "if need be". If subs. (1) were ambiguous, the proviso 55



might elucidate its meaning. But it is not permissible to qualify or extend an unambiguous enacting clause in order to give operative effect to such a proviso. I am, accordingly, not prepared, in order to give operative effect to subs. (3), to interpret subs. (1) in a sense which its words do not bear.

It follows that, as the respondent holds her title to the bed *ad medium filum aquae* by grant from the Crown, s. 206 does not apply, and the claim of the Crown fails, whether the river be navigable or not.

The next point to be considered is the submission that, by reason of the provisions of the River Boards Act, 1908, the respondent can get no certificate of title to any part of the bed. Section 73 (1) reads as follows :

(1) All rivers, streams, and watercourses within any river district constituted under this Act, whether or not the same are navigable or are altered by the ebb and flow of the tide, shall be to all intents and purposes within and subject to the jurisdiction of the Board, so far as may be requisite for the construction or maintenance of any works necessary to prevent or lessen any damage which may be occasioned by the overflow or the breaking of the banks of the same.

Then there is s. 78, the relevant portion of which is as follows :

78. All the lands, buildings, erections, works, and other things which have been or hereafter are taken, purchased, obtained, erected, constructed, and made by or by the order, or which are or shall be within or under the view, cognizance, or management, of any Board, with the several conveniences and appurtenances thereto respectively belonging; . . . shall be and the same are hereby vested in and shall be deemed to be the property of the Board.

It is established that these provisions vest the beds of the rivers in the Board, though the proprietary interest so vesting is a limited one only : see *Kingdon v. Hutt River Board* ( (1905) 25 N.Z.L.R. 145 ; 7 G.L.R. 634) and *Ahikouka River Board v. Wairarapa South County* ( [1926] N.Z.L.R. 182, 186, 187 ; [1926] G.L.R. 1, 4). (A contrary view would seem to be taken in England in regard to the beds of rivers : *Salisbury and Fordingbridge Drainage District Board v. Southern Tanning Co.* (1920), *Ltd.*, [1927] 2 K.B. 566, 581.) To the English authorities referred to in *Kingdon's* case, which deal mainly with streets and sewers, there may be usefully added, for a modern review of the authorities, the decision of the Court of Appeal in *Port of London Authority v. Canvey Island Commissioners* ([1932] 1 Ch. 446, 475, 476, 483, 485, 490, 502).

The question we are concerned with is not one merely as to the statutory powers of the Board. I do not see how the existence of such powers could effect the respondent's title to the bed, or her right to a certificate of title in respect thereof. But the possession by the Board of a vested proprietary interest in the bed, even though of a limited character, is a different matter.

Mr. Wild contended that the Board's interest does not amount to ownership and is wholly irrespective of title. He relied on two authorities, the first being the decision of the Privy Council in *Municipal Council of Sydney v. Young* ([1898] A.C. 457), where it was said : " Now " it has been settled by repeated authorities, which were referred to by " the learned Chief Justice, that the vesting of a street or public way " vests no property in the municipal authority beyond the surface of " the street, and such portion as may be absolutely necessarily incidental " to the repairing and proper management of the street, but that it does " not vest the soil or the land in them as the owners. If that be so, " the only claim that they could make would be for the surface of the " street as being merely property vested in them *qua* street, and not as " general property " (*ibid.*, 459).



I read this passage as meaning, however, only that the physical extent of the ownership is limited—that is to say, that the soil or land is not owned *usque ad coelum et ad inferos*. The passage recognizes a vesting of property in the surface and such further portion as is necessary. Mr. *Wild's* second authority was a passage in the judgment of *Romer, L.J.*, in *Finchley Electric Light Company v. Finchley Urban District Council* ([1903] 1 Ch. 437). But *Romer, L.J.*, plainly recognizes there a vesting of "so much of the actual soil of the street as might be necessary . . . a certain limited physical part of the street" (*ibid.*, 443, 444); and, when he goes on to say that the statutory provision has "nothing to do with title; it is not considering a question of title", he is obviously referring to the general property in the soil, and not contradicting what he has just said. There is, moreover, the following clear statement by *Sir Richard Henn Collins, M.R.*, in the same case: " . . . the word 'vest' means that the local authority do actually become the owners of the street to this extent: they become the owners of so much of the air above and of the soil below as is necessary to the ordinary user of the street as a street, and of no more" (*ibid.*, 440).

The effect of such statutory provisions is, I think, clearly shown in *Port of London Authority v. Cawsey Island Commissioners* ([1932] 1 Ch. 446). They do not "vest the soil and the freehold of the land . . . from the centre of the earth up to an unlimited extent into space, but only the surface of the land and so much space above and below it as is essential . . ." (per *Lawrence, L.J.*, *ibid.*, 483, 484). They pass "an interest in the soil itself and not merely an easement, [though the interest is] no greater than is requisite, [and is] the least interest in the soil that is compatible with the proper exercise of the 'powers'" (per *Romer, L.J.*, *ibid.*, 501, 502). Whatever its precise legal nature may be, it is, in my opinion, an ownership, though limited physically to the minimum that is necessary.

What has been said above as to the fluctuating nature of river-boundaries must apply also to the interest of the River Board in the bed. That interest will shift as the bed shifts by accretion and erosion: and the respondent's title to any accretion is, therefore, unaffected by the provisions of the River Boards Act, 1908.

The foregoing conclusions dispose of the question of title. Any proved accretion will belong absolutely to the respondent, subject only to the hazard of future changes in the river boundary. She has also a movable freehold in the bed itself *ad medium filum*, excepting thereon so much as is comprised in the similarly shifting statutory ownership of the River Board. There remains the question whether she is entitled to have such rights embodied in a certificate of title under the Land Transfer Act.

As to any accretion, it is already hers by virtue of her existing certificate of title, and is, in the contemplation of the law, included therein. It may be open to doubt whether accretion gives rise to an "error" or "omission" within the meaning of s. 80 of the Land Transfer Act, 1952. But I do not think we are called upon to construe that section, and all that need be said is that no amendment of the respondent's existing title, and no new title that may be issued, may be so expressed as to purport to give her a boundary defined by metes and bounds in place of her fluctuating river boundary. No matter how much the area of her land may have increased or how its shape may have changed, it has to be remembered that all that the Crown has ever 55

granted in respect of this land is a title with a fluctuating river boundary. What effect that may have in regard to subdivision is a question that does not arise in this case.

With regard to the respondent's title to the bed *ad medium filum aque*, it also is already, in point of law, within her existing certificate of title. There is no reason that I can see why it should not be expressly included by amendment, or even made the subject of a separate certificate. Her interest in the bed is not a mere appurtenance or appendage to the riparian title, and at common law, and also, in my opinion, under the Land Transfer Act, is capable of being dealt with separately: *Coulson and Forbes on Waters and Land Drainage*, 6th Ed., 115. But the boundaries are on the one side the fluctuating boundary of the river-bank and on the other the fluctuating middle line; and they must be correctly so described and not converted into fixed boundaries.

In my opinion, the essence of the decision in *In re White* (1927) 27 N.S.W.S.R. 129 is that the title to the bed, being one with fluctuating boundaries, could not be converted into one with fixed boundaries; and I respectfully accept the reasoning and results of the judgment so far as they rest on that ground. Two matters were decided: (1) that the boundaries could not be defined by metes and bounds, and (2) that the description in the certificate of the land comprised therein should contain a statement that the ownership extended *ad medium filum*. Thus, the bed was expressly included in the title. It seems to me to be immaterial whether the thing is done by mere words, or by plan, or in both ways, so long as the fluctuating nature of the boundaries is made clear. Being of opinion that the interest in the bed may be the subject of a separate certificate of title, I could not agree—and I do not think that *In re White* decided—that it can only be described, by general words, as a sort of annexure to the riparian title.

In *In re White* two other grounds were suggested as affecting the applicant's right: (1) the rights of other riparian owners in regard to the natural flow of the stream, and (2) any rights acquired by the public. But every title to any part of the bed of a river is, in my opinion, necessarily subject to such subsisting rights in respect of the waters: *Coulson and Forbes on Waters and Land Drainage*, 6th Ed., 118. It is so at common law, and I do not see that a Land Transfer title can make any difference. If it may, the matter is one to be dealt with, not by denying a certificate of title, but by the making of appropriate reservations in the certificate; but I need not consider how, or to what extent, if at all, this needs to be done. Nothing of the kind was, in fact, insisted on in the actual decision in *In re White* providing for the embodiment in the certificate of the right *ad medium filum*.

In any certificate of title issued to the respondent and expressed as extending *ad medium filum*, there must, of course, be appropriate words excepting thereout the surface of the bed and so much above and below the surface as is comprised in the statutory title of the River Board. I cannot see that the existence of the Board's title is any ground for refusing to the respondent a certificate of title for what she owns. I recognize that it is difficult or impossible to delimit geometrically the extent of the horizontal exclusion. The law is too uncertain to enable a plan to be constructed. But a plan is only a means of description, and the excepted interest can be adequately described without a plan.

These being my views, I would give such relief as is appropriate in accordance therewith. But as these views are not shared by my brethren, I need not consider relief in detail. I would concur in allowing

the appeal, but doubt whether the proposed order as to costs is entirely just, the appellants having, on any view of the case, failed in several of their contentions, and respondent's being left with a possibility of establishing a title to part of what she claimed.

There is one further matter to which I think reference should be made for the guidance of the parties. It appears to have been assumed that the physical extent of the respondent's rights (if any) is to be ascertained by a prolongation in straight lines of her upper and lower boundaries which meet the bank of the river. This is almost certainly wrong both as to accretions and as to title *ad medium filum*. As to the ascertainment of the upper and lower boundaries of accretions, see *Riddiford v. Feist* (1902) 5 G.L.R. 43 where the subject is fully discussed; and, as to title *ad medium filum*, see the footnote in *Coulson and Forbes on Waters and Land Drainage*, 6th Ed., 113, citing *Darling's Trustees v. Caledonian Railway Co.* (1903) 5 F. (Ct. of Sess.) 1001 and other cases.

*Appeal allowed.*

Solicitors for the appellants: *Crown Law Office* (Wellington) and *Hogg, Gillespie, Carter, and Oakley* (Wellington).

Solicitors for the respondent: *Bell, Gully, and Co.* (Wellington).

[IN THE LAND VALUATION COURT.]

### *In re* WANGANUI CITY VALUATIONS.

LAND VALUATION COURT. Wanganui. 1954. July 28, 29; November 18. ARCHER, J.

*Valuation of Land—Unimproved Value of City Properties—Valuation by Comparison with Normal Sales of Similar Land recently sold—Proper Method of Valuation—Capitalization of Net Annual Rentals Considered—Valuation of Land Act, 1951, s. 23.*

Seven owners of shop properties in Victoria Avenue, Wanganui, appealed against decisions of the Wanganui Land Valuation Committee, upon their objections to valuations made by the Valuer-General, on a revision of the Valuation Roll for the City of Wanganui. The general effect of the revision was to increase the aggregate capital value for the City by approximately 75 per cent., with similar increases in both the unimproved value and the aggregate of improvements. The respective increases in Victoria Avenue, the principal shopping street of Wanganui, varied somewhat from the general average. In this street, the average increase in capital value was about 60 per cent.; in unimproved value, 44 per cent.; and in the value of improvements, 83 per cent.

The appellants made no objection before the Court to certain increases in the capital value of their properties, which had been made by the Land Valuation Committee. The evidence showed that there had been a number of sales of shop properties in Victoria Avenue, both before and since the date of the revision, and that the prices paid had in general been higher than the capital values fixed on the revision.

The appellants claimed, however, that in the apportionment of the capital values as between the land and the improvements, too much had been allowed for the land and too little for the improvements; and they contended that there should be a general reduction of 50 per cent. in the unimproved values of the properties concerned. In accordance with the prescribed form of objection, they had set out their estimates of the true values of their respective properties; and in the aggregate, they asked therein for unimproved values totalling £38,310 to be reduced to £29,712, or by about 23 per cent.

The Land Valuation Committee made minor reductions in the unimproved value in six of the cases. The issue before the Court was whether the unimproved values in all the cases should be further reduced, on the ground that the Valuer-General had adopted a wrong method of valuation.

H., the valuer principally concerned, said in evidence that he first fixed the unimproved value of each property by reference to six sales of comparable properties in Victoria Avenue. By an analysis of these sales, made with the advantage of long experience as a valuer in Wanganui and elsewhere, and taking into account all other relevant facts which were available, he had determined the unimproved values of the six properties sold. From these values, and with the assistance of a traffic count taken at four suitable points, he had then drawn up a graded scale of unimproved values for Victoria Avenue. He said that he had done this without regard to the improvements on any individual property, save in the case of the six properties which had been sold. The improvements on all other properties had been valued by G.; and the capital values in each case had been arrived at by the addition to the unimproved value, which H. had found, of the value of the improvements which had been independently assessed by G.

*Held*, 1. That the evidence did not warrant the conclusion that the Valuer-General had adopted a wrong principle of valuation.

*Thomas v. Valuer-General* ([1918] N.Z.L.R. 164; [1918] G.L.R. 64) followed.

2. That there was nothing in the evidence to justify the appellants' view that there had been a reduction in unimproved values in Victoria Avenue since 1947, when the previous valuation had been made; and that the acknowledged increases in capital values since that date had been reflected in the value of the land as well as in the value of the improvements thereon.

*In re Lismore Valuations* (1953) 12 *The Valuer*, 277) referred to.

3. That the appellants had not discharged the onus of proof imposed on them by s. 23 of the Valuation of Land Act, 1923; and their claim for a general reduction of 50 per cent. in the unimproved values fixed by the revision of the Valuation Rolls in 1952 accordingly failed.

APPEALS by seven owners of shop properties in Victoria Avenue, Wanganui, against decisions of the Wanganui Land Valuation Committee upon objections to valuations made by the Valuer-General on a revision of the Valuation Roll for the City of Wanganui, dated March 31, 1952. The previous Valuation Roll had been made in 1947, and was based on 1942 values, in accordance with the law then in force. The general effect of the 1952 revision was to increase the aggregate capital value for the city by approximately 75 per cent., with similar increases in both the unimproved value and the aggregate value of improvements. The respective increases in Victoria Avenue, the principal shopping street of Wanganui, varied somewhat from the general average. In this street the average increase in capital value was about 60 per cent., in unimproved value 44 per cent., and in the value of improvements 83 per cent. It followed that the proportion of the aggregate unimproved value for the city as a whole which was borne by Victoria Avenue land had been somewhat reduced by the revision. While in 1951-52 it amounted to 27.28 per cent., it was reduced for the year 1952-53 to 22.81 per cent. of the whole.

*Armstrong*, for the appellants.

20 *Heenan*, for the Crown.

*Cur. adv. vult.*

The judgment of the Court was delivered by

ARCHER, J. [After stating the facts, as above:] These general facts assume some importance because the principal complaint of the appel-

lants was that the unimproved values fixed for Victoria Avenue land were too high, and that in consequence (city rating being on unimproved value), their properties were called upon to bear an undue proportion of the city rates. The natural inference from this complaint was that the increase in the appellants' valuations had added to their rating liability, but this does not appear to have been the case. As already pointed out, the share of the total rating liability of the city which is borne by Victoria Avenue land has been somewhat reduced, and a correspondingly greater share is now borne by the rest of the city. The evidence showed that, in consequence of the revision, the general rate was reduced from 2s. 6½d. in the £ for the year 1951-52 to 1s. 6½d. in the £ for the following year. In the case of three of the properties concerned in the appeal, and which were claimed to be typical, the aggregate rates payable were said to have been reduced from £1364, 9s. 10d. in 1951-52, to £1,274 18s. 6d. in 1952-53.

The appellants made no objection before the Court to certain increases in the capital value of their properties, which had been made by the Committee. The evidence showed that there had been a number of sales of shop properties in Victoria Avenue, both before and since the date of the revision; and that the prices paid had, in general, been higher than the capital values fixed on the revision. It would, therefore, appear that the burden of rates had not been found so heavy as to depreciate the market values of Victoria Avenue properties to below the capital values so fixed.

The appellants claimed, however, that in the apportionment of these capital values as between the land and the improvements, too much had been allowed for the land and too little for the improvements. In accordance with the prescribed form of objection, they had set out their estimates of the true values of their respective properties. In the aggregate they asked (in these forms of objection) for unimproved values totalling £38,310 to be reduced to £29,712, or by about 23 per cent.

The case put by the appellants to the Court, however, was that there should be a general reduction of 50 per cent. in the unimproved values of the properties concerned. No attempt was made to assess the unimproved values of the individual properties, save in such general terms as were claimed to show that the values fixed upon the revision were so grossly excessive that it would be reasonable to reduce them by half. The Committee made minor reductions in unimproved value in six of the cases, and the issue now before us is whether the unimproved values in all cases should be further reduced.

It is provided by s. 23 of the Valuation of Land Act, 1951, that the onus of proof upon the hearing of an objection rests with the objectors, and it is, therefore, for the appellants to satisfy us that the assessments in question, as amended by the Committee, are still too high.

The revaluation of Victoria Avenue was based on the values which had been fixed in 1947, and which were then either accepted by the owners or adjusted in appropriate proceedings. If the present claims by the appellants are correct, it must follow either that these valuations were grossly too high, or that there has been a substantial fall in unimproved values between 1947 and 1952. The 1947 valuations were made in accordance with the Servicemen's Settlement and Land Sales Act, 1943, and the suggestion that unimproved values in Victoria Avenue, Wanganni, were considerably less in March, 1952, than in December, 1942, is startling, and contrary to general experience in other

parts of New Zealand. It is difficult to reconcile with the fact that the unimproved values assessed for the rest of Wanganui were increased on the average to a greater degree than in the case of Victoria Avenue, and were generally accepted without serious objection. It appears to be inconsistent with the admission that there has been a substantial increase in capital values, and with the fact that though all the land in Victoria Avenue has been revalued on a uniformly graded scale, only seven objections have been brought before the Court.

The acceptance in full of the appellants' claims would lead to disturbing results. It would mean that seven property owners would have their rates reduced to about one half, while the owners of neighbouring properties would continue to be liable for the same rates as before, unless able to obtain consequential adjustments in their valuations. If all unimproved values for Victoria Avenue were reduced by 50 per cent. as sought by the appellants, the aggregate values in this street would be reduced from £603,345 to £301,673, and the proportion of the city rates payable in respect of this area would be reduced from 22.81 per cent. to 12.87 per cent. It is, of course, probable that the amount by which Victoria Avenue ratepayers would be so relieved would have to be found by an increase in the rate levied over the city as a whole. These facts should not deter us from accepting the appellants' contentions if sound, but they warrant the comment that it is not without good reason that the burden of proof is laid upon the appellants.

The Valuer-General's assessments were attacked by the appellants on the ground that a wrong method of valuation had been adopted, and it was alleged to follow from this that his valuations could have no validity. The Committee accepted this contention and expressed itself in its judgment in the following terms:

"The method adopted by the Government Valuer is in no sort of doubt whatever. He stated that, with respect to each property, he first estimated its capital value by reference and relation to six sales of improved properties in Victoria Avenue during the previous year. Having thus fixed the capital values of the objectors' properties, the Valuer then fixed the value of the then existing improvements on such properties—they were all shop or office properties—and then deducted the value of such improvements from the capital value already determined, and treated the difference as the unimproved value of the properties. We are of opinion that such a method of ascertaining the unimproved value is clearly wrong and contrary to the express provisions of the Valuation of Land Act, and it has more than once been so held by the Courts."

The Committee purported to base its findings upon *Duthie v. Valuer-General* (1902) 20 N.Z.L.R. 585; *Thomas v. Valuer-General*, [1918] N.Z.L.R. 164; [1918] G.L.R. 64, and *Toohey's, Ltd. v. Valuer-General*, [1925] A.C. 439.

We are bound by the principles enunciated in these well-known cases, and it is clear that if the Government valuer had in fact followed the course described in the Committee's judgment, his procedure would have been in conflict with these principles. We have re-heard the evidence, however, and are of opinion that, as given before us, the evidence does not warrant the conclusion that the Government valuer's methods were as described by the Committee, and were such as to warrant the criticism applied to them.

Mr. Hartnell, the valuer principally concerned, said in his evidence that he first fixed the unimproved value of each property by reference

to six sales of comparable properties in Victoria Avenue. Explaining his method in detail, he said that by an analysis of these sales, made with the advantage of long experience as a valuer in Wanganui and elsewhere, and taking into account all other relevant facts which were available, he had determined the unimproved values of the six properties sold. From these values, and with the assistance of a traffic count taken at four suitable points, he had then drawn up a graded scale of unimproved values for Victoria Avenue. He said he had done this without regard to the improvements on any individual property, save in the case of the six properties which had been sold. He said that the improvements on all other properties had been valued by a Mr. Gilliland, and that the capital values in each case had been arrived at by the addition, to the unimproved value which he had found, of the value of the improvements which had been independently assessed by Mr. Gilliland.

Mr. Hartnell was not discredited in cross-examination, and, notwithstanding the different view taken by the Committee, we see no reason to reject his evidence. If it is accepted it would seem that he was not guilty of any infraction of the principles laid down in the cases cited, but that he acted strictly in accordance with *Thomas v. Valuer-General* ([1918] N.Z.L.R. 164; [1918] G.L.R. 64), the headnote of which includes the following:

The Valuer can not be said to have adopted a wrong principle of valuation by determining first the unimproved value and then adding the value of the improvements to ascertain the capital value.

The great weight given by the Committee to this matter is clear from the following quotations from its judgment, and from the report supplied to the Court by the Chairman:

It is hard to understand why a method so strongly condemned as being contrary to the law should still be followed. As it is contrary to the law, we cannot accept or sustain the findings of the unimproved values deduced by such a method . . .

The Committee was of opinion that the method of ascertaining the unimproved values used by the Valuer-General was not in accordance with the provisions of the Valuation of Land Act, and that therefore there was no presumption that the unimproved values so found were correct.

It would seem, therefore, that the Committee considered that the Department's supposed adoption of a wrong method of valuation conclusively established that its assessments could not be accepted, and relieved the objectors of any further responsibility to prove them to be wrong. Our contrary finding upon this aspect of the matter means that whatever might otherwise have been the case, as to which we express no opinion, the onus of proof still rests upon the appellants.

The question for determination, then, is whether the evidence as a whole establishes that the unimproved values, as adjusted by the Committee, are too high. In support of this contention, the appellants relied on the evidence of Mr. Prince, an architect, and Mr. Moffett, an estate agent and valuer. Mr. Prince made no claim to be a valuer or to have valued any of the properties concerned, and his evidence related only to building costs as at the date of the revision. Mr. Moffett applied these costs to calculations he had made in order to determine the unimproved values of the respective properties. In so doing, he made reference to the four methods of arriving at unimproved value which are described by J. F. N. Murray in his book, *Principles and Practice of Valuation*, namely—

- (1) By comparison with similar lands sold in an unimproved state.
- (2) By analysis of sales of improved land.
- (3) By capitalization of actual net rentals.
- (4) By capitalization of net rentals based on hypothetical development.

5 It is generally agreed that the first of these methods is the most direct and reliable, provided there have been sufficient suitable sales of unimproved land for purposes of comparison. In this instance, the only sale which might be of use in this respect was a sale in July, 1950, of a vacant section in Victoria Avenue, some distance from the properties  
10 concerned in these appeals, and where the land was agreed to be of much less value than where these properties are situated. The sale in question was at a price slightly above its 1947 Roll value, but well below the value fixed on the 1952 revision, which the then owners, nevertheless, accepted without objection. Mr. Moffett invited the Court to draw  
15 certain inferences from this sale, but we confess that we have been unable to follow his reasoning. It was a single sale which took place some time before the date of revision, and was of land some distance from the best part of Victoria Avenue. It is, therefore, in our opinion, of little value as a guide to unimproved values in the more valuable  
20 portions of the Avenue. Mr. Moffett admitted as much in cross-examination; and the appellants' case cannot be supported by reference thereto, or by the calculations which Mr. Moffett attempted to base thereon.

The second method is one which has been frequently accepted,  
25 subject to a proper recognition of its limitations, by the Courts. This was the method principally relied on by the Department, according to Mr. Hartnell, whose evidence thereon we are prepared to accept. There were seven sales of properties in Victoria Avenue during 1950, ten sales in 1951, and there have been eight sales since the date of the  
30 revision. It is a basic principle that the sales to be relied on must be normal sales made reasonably near to the date of valuation. Mr. Hartnell said he had disregarded the 1950 sales because he thought them too far removed in point of time, and had disregarded four of the 1951 sales for various reasons. He claimed to have analysed the other  
35 six sales in 1951 and to have been able to ascertain from his analysis, together with other facts in his possession, the market value of the land sold; and from that to have been able to draw up a graduated scale of values for unimproved land in Victoria Avenue. We are aware that the reliability of any assessment of unimproved value is largely dependent  
40 upon the integrity, judgment, and experience of the valuer, but Mr. Hartnell impressed us as a valuer of experience, whose opinions could, in general, be relied on. It must be held against the appellants that their valuer, Mr. Moffett, had made no attempt to use this well-recognized method of valuation, and he appeared to have been little influ-  
45 enced in his opinions as to value by any of the actual sales.

Mr. Moffett had relied principally upon the third and fourth methods of valuation, which while theoretically acceptable, are so much dependent on judgment and opinion as to be liable to a wide margin of error.

The third method is based upon a capitalization of the net annual  
50 rentals of the properties in question, after deduction from the gross rentals of all proper outgoings, and of allowances for repairs and depreciation and for interest on the value of the improvements.

The fourth method is similar in character, being based upon a capitalization of the estimated net rentals which could be obtained,  
55 after making similar deductions from the estimated gross rental recover-



able from a hypothetical building designed to make the best use of the land.

Under these methods the valuer has to assess, in the one case, the value of the existing buildings, and, in the other, the cost of a hypothetical building; while in each case he must estimate the annual outgoings and fix a proper allowance for interest and a proper rate for capitalization, all being matters of opinion which vitally affect the final result. It may be of interest to note that, in applying either of these methods, an additional allowance of 10s. per week in the estimated net rentals would automatically result in an increase of £26 in the balance to be capitalized, which if capitalized at 5 per cent. would result in an increase in the resulting unimproved value of £520, or, if capitalized at 4 per cent., of £650.

There were substantial differences between Mr. Prince and the Department as to building costs in March, 1952, and between Mr. Moffett and the Department as to proper rates for interest and capitalization. Mr. Moffett used both for the calculation of interest and for capitalization a rate of 5 per cent., implying thereby that an owner of property in Victoria Avenue should be assured of a net return of 5 per cent. upon the value of the land and of the buildings, and whether calculated in respect of the buildings actually upon the land, or of hypothetical buildings to be erected thereon. The 5 per cent. rate was accepted by the Committee; but, notwithstanding that it may appear *prima facie* to be reasonable, we have considerable doubt whether it is the proper rate to use for the purposes of this case. Its propriety must be tested, we think, by reference to the net returns on capital being received by the owners of properties in Victoria Avenue at or about the date of valuation. There is no material dispute as to the capital values of the properties under appeal, and it should not be difficult, therefore, to ascertain the net returns received by the owners. Mr. Moffett himself purported to calculate the net rentals in respect of four of these properties, and arrived at the conclusion that the net return in each case was either less, or very little more, than 3 per cent. of the capital value. Mr. Hartnell had taken out the net rentals of the six properties on the sales of which he had based his unimproved values, and found that the current rentals were returning on the average, little more than 2 per cent. net upon the prices paid for the properties concerned. Mr. Moffett agreed that the net rentals in these cases would not, for the most part, exceed  $2\frac{1}{2}$  per cent.

The propriety of a capitalization rate so high as 5 per cent. has been considered in several reported cases. In *R. Estate to B. Co., Ltd.* (1947) 23 N.Z.L.J. 183, it was shown in evidence that the net income from rentals of a large city building in Christchurch, consent to the sale of which for £45,000 was sought in the Land Sales Court, had never, in a long period of years, reached 2 per cent. of the owners' estimate of its value. It was also shown that, assuming an increase in gross rentals of 25 per cent., the net return upon the price of £45,000 would have been no more than 2.1 per cent., or with a 50 per cent. increase, 3 per cent.; though, by reason of rent restrictions, such increases were by no means likely. The Court expressed the view that a reasonable net return for an investor in city property would be 4 per cent., though, on the price of £40,000, at which the sale was approved, the immediate net return to the buyer might have been no more than half that amount.

In *re a Lease, Wellington City Corporation to Wilson* (1936) 55

1 N.Z.L.G.R. 394), *Smith, J.*, discussed the rental that should be paid by a prudent lessee of Wellington city property on the renewal of a twenty-one years' lease. There was evidence that, in practice, renewals had been made at from  $1\frac{1}{2}$  per cent. to  $3\frac{1}{2}$  per cent. of the unimproved value, and the rental fixed was equivalent to 3.3 per cent. of the value of the land.

In the Land and Valuation Court (Australia), *Sugarmun, J.*, in his judgment on *Objections to Valuations in the Valuation District of Lismore* ( (1953) 12 *The Valuer*, 277), discussed very fully the methods of ascertaining unimproved value and their limitations. A Government valuer had there used a capitalization rate of  $3\frac{1}{2}$  per cent. as against a rate of 6 $\frac{1}{2}$  per cent. used by a valuer called by the objectors, while it was alleged that the Fair Rents Board had adopted the practice of allowing rents calculated to produce a net return of 5 per cent. The evidence suggested that sale prices were consistent with net returns averaging in the vicinity of  $3\frac{1}{2}$  per cent., and *Sugarmun, J.*, appears to have considered a capitalization rate of 4 per cent. to be reasonable in all the circumstances.

We are of opinion that the proper rate for capitalization is, in part, dependent upon the facts of the particular case, and upon the evidence of values, rentals and prices at the time and place in question. In this case, there is substantial agreement as to capital values, and ample evidence of sales to confirm the capital values assigned to Victoria Avenue properties upon the 1952 revision. The evidence shows quite clearly, however, that the rentals then current did not return a net 5 per cent. on such values to the owners. It, therefore, appears to us that a 5 per cent. capitalization rate is too high, and that calculations based thereon are, in consequence, misleading.

Before examining Mr. Moffett's evidence further, we think it proper to mention that there was a considerable measure of inconsistency in the views advanced by or on behalf of the appellants as to the values of their respective properties. This may be illustrated by reference to one of the properties under appeal, that of Wanganui Leatheries, Ltd. The valuation of this property upon the 1952 revision was as follows:

Capital Value	Unimproved Value	Value of Improvements
£11,730	£6,930	£4,800

The Notice of Objection lodged by the owners contained the statement:

The purchase price 15 months ago was £10,000 and in that time values have receded. We paid the ceiling price and cannot see that values have advanced.

Embodied in the notice was the owners' estimate of the value of the property, which was as follows:

Capital Value	Unimproved Value	Value of Improvements
£10,000	£4,785	£5,215

After hearing the objection, the Committee amended the valuation to read:

Capital Value	Unimproved Value	Value of Improvements
£12,400	£6,600	£5,800

Notwithstanding their opinions as expressed in their objection, the owners accepted this increase in the capital value, but appealed against the unimproved value of £6,600.

Before the Court, Mr. Moffett explained that he had assessed the unimproved value by four separate methods, and with the following results :

1st method : £3,589  
2nd method : £3,640  
3rd method : £620  
4th method : £2,780  
(or £3,780)

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Mr. Moffett then declared himself satisfied that the original unimproved value of £6,930 ought to be reduced by half, or to £3,465.

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As the owners had accepted the capital value of £12,400 fixed by the Committee, it follows that the Court was invited, if it accepted the proposed unimproved value of £3,465, to fix the value of the improvements at £8,935. Mr. Moffett had himself valued the improvements, however, at £7,220, while the owners themselves had estimated their value at £5,215. It will be seen, therefore (for the foregoing figures are typical of those applicable to all the properties concerned), that the objectors appear to have had little regard to the necessity of fixing accurate values for the improvements, and to have overlooked the fact that, in the valuation of a property for roll purposes, the same measure of accuracy is required of a valuer in respect of his valuation of the improvements as of his assessment of unimproved value.

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In the *Lismore* case ( (1953) 12 *The Valuer* 277, *Sugarman, J.*, said : "The unimproved value of land, as defined by the Statute, is in circumstances such as have had to be considered in these proceedings "and in the absence of any sales of unimproved land, an uncertain and "entirely hypothetical quantity. The evidence leaves me with the "impression that within limits its estimation is largely a matter dependent upon opinion . . . I find myself unable to set down "any principle for guidance except of the most general description. "Subject to what I have already said as to the possibility of fresh "considerations suggested by further material, it seems to be impossible "to ascertain the unimproved value in circumstances resembling those "in these proceedings by mathematical inferences from ascertained "facts. The process required seems to be rather that of bringing a "sound and cautious judgment to bear upon such information as is "available of the character of that which has been referred to in "evidence in this case, and in these reasons . . . Having carefully "considered the evidence in these objections, I find it impossible to "hold that the values assigned by the Valuer-General are too high. "In my opinion, therefore, the objections listed in the heading to these "reasons should be disallowed."

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The *Lismore* objections related to the unimproved values assigned to premises in a retail-shopping block, and both as to the matters in issue and as to the methods of valuation sought to be applied, the case has much in common with that now before us. We find ourselves in agreement with the learned Judge concerning the practical difficulties of ascertaining unimproved value; the danger of placing too much reliance upon mathematical calculations; and the importance in the last resort of sound opinion and informed judgment.

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The evidence of Mr. Moffett, in our opinion, suffered by reason of an excessive reliance upon mathematical calculations and of the adoption, for the purposes of his calculations, of premises not intrinsically sound, and tending, therefore, to reflect upon his judgment as a valuer. We have already mentioned Mr. Moffett's adoption of too high a rate for capitalization. He was also, in our opinion, too ready to accept

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the opinions of Mr. Prince as to building costs, while prepared to ignore the published figures of the New Zealand Institute of Valuers, of which he was a member. Suitable adjustments in connection with these matters would have profoundly affected Mr. Moffett's calculations, and invalidated his conclusions.

There were other respects in which inferences sought to be drawn by Mr. Moffett appeared to us to lack logical validity. His primary calculations from rental returns led to a conclusion which was patently unsound, namely, that land in Victoria Avenue was worthless at the date of the revision. To escape from that untenable position, Mr. Moffett assumed a reduction of 50 per cent. in the rates currently payable, and was thereby enabled to amend his figures so as to provide for unimproved values of about half the amount of those subject to appeal. It cannot properly be assumed, however, that the city rates for the most valuable business area of Wanganui could be halved by the simple expedient of halving the unimproved values of all the properties in the area, or that, if it were possible, that would be a proper ground for halving the valuations of the properties concerned.

Even in respect of his theory as to the halving of the rates, Mr. Moffett was not consistent. He applied it (in the case of Wanganui Leatheries, Ltd.) in his calculations based on the capitalization of rentals from a hypothetical building, and thereby obtained a value for the land of £3,640. To obtain this result, he took the rates into account at £272—or half the actual rates of £545. In precisely similar calculations based on capitalization of the present net rentals, Mr. Moffett made no such adjustment, but took the rates into account at £545, with the result that he obtained an unimproved value of £620. If, as would have been logical, Mr. Moffett had taken the rates into account at £272, the resulting unimproved value would not have been £620, but £6,060. When similar methods of assessment produce such divergent results as £3,640 and £620 (or £6,060), in respect of the same piece of land, there must be something fundamentally wrong with the respective calculations, and their unreliability is self-evident.

We are, therefore, unable to accept the assessments which Mr. Moffett sought to justify from the figures and material he placed before us, though we were impressed by the care with which he had prepared his evidence, and the frankness with which his views were stated. We are prepared to believe that Mr. Moffett had convinced himself that there should be a general and substantial reduction of unimproved values in Victoria Avenue, but we think he was mistaken in this regard, and that he had been misled by his own calculations and by a failure to appreciate the danger of an uncritical acceptance of conclusions based upon mathematical computations. In the absence of comparable sales of vacant land, we are in much the same position as was *Sugarman, J.*, in the *Lismore* case (1953) 12 *The Valuer*, 277, already referred to; and, for the reasons we have given, we are of opinion that the judgment and opinions of the officers of the Valuation Department are, in general, to be preferred to those of Mr. Moffett. We find nothing in the evidence to justify the view that there has been a reduction in unimproved values in Victoria Avenue, Wanganui, since 1947, and we think it logical to suppose that the acknowledged increases in capital values since that date has been reflected in increases in the value of land as well as in the value of the improvements thereon. The claim of the appellants that there should be a general reduction of 50 per cent. in the unimproved values fixed upon the 1952 Revision of the Valuation Roll accordingly fails.

The question whether there should be any lesser reduction, or any adjustment of individual unimproved values, was raised by the appellants only in cross-examination of the respondent's valuers, by whom it was suggested that there had been a tendency to take too conservative a view of the value of the buildings, and too liberal a view as to unimproved values. The Committee made minor reductions in the unimproved values assigned to six of the seven properties affected, and presumably made the adjustments it deemed necessary to correct any excess of conservatism or of liberality, as the case might be, on the part of the Government valuers. We are not satisfied that the unimproved values, as adjusted by the Committee, are in any of the cases still too high, and all the appeals are, therefore, disallowed.

It was suggested at the hearing that a minor adjustment might be made by agreement with respect to the property of Mrs. G. M. Campbell, but we have been informed that no further adjustment can be agreed to by the Valuer-General beyond that already made by the Committee; and the Court's decision is, therefore, the same in Mrs. Campbell's case as in the case of the other appellants.

*Appeals dismissed.*

Solicitors for the appellants: *Armstrong, Barton, and Armstrong* (Wanganui).

Solicitor for the respondent: *Valuation Department Solicitor* (Wellington).

[IN THE SUPREME COURT.]

## HOLLANDER v. LUNN.

SUPREME COURT. Christchurch. 1955. April 21; May 23.  
MCGREGOR, J.

*Transport—Parking Signs—Class D Sign—Requirements as to Notice of Time and Place of Prohibition or Restriction of Parking—Letters “NP” Operative Portion of Sign—Immaterial Whether Explanation of Time or Explanation of Place above Other of Them, if Both directly below Operative Portion—Traffic Sign Regulations, 1937 (Serial No. 1954/180 (Reprint)), Regs. 2 (5b), 2 (5c), 3 (4) (iii), 3 (15) (d); Schedule, Diagram 5b—Traffic Regulations, 1936 (Serial No. 1936/86), Regs. 4 (7) (c), 4 (7) (e).*

Where it is desired to make it an offence to disobey any indicated prohibition or restriction of parking in a roadway, the limits of the area of prohibition or restriction of the parking of vehicles must be indicated clearly and without ambiguity; and, in the words of Reg. 3 (4) (i) of the Traffic Sign Regulations, 1937, the indication or notice erected must be such as to “give reasonable notice” to a person or persons affected, or who might be affected, of the place where such prohibition or restriction has been duly imposed.

*Kellar v. Dallison* ([1953] G.L.R. 115) referred to.

The operative portion of a sign of Class D in the Schedule to the Traffic Sign Regulations, 1937, is the notice prohibiting parking (“NP”). The explanation as to permissible hours is a reasonable notice to the public of the extent in time of the prohibition. The arrow on the sign is an explanation of place. It is immaterial which explanation is placed above the other, if they are both placed directly below the operative portion of the sign.

APPEAL from the appellant's conviction by a Magistrate, on an information that on March 26, 1954, at Christchurch, being in charge of a vehicle, namely motor-car No. 60159, he did park such vehicle in High Street in a part of the roadway where a notice is maintained by a controlling authority indicating that the parking of vehicles is prohibited.

The information was laid under Reg. 4 (7) (e) of the Traffic Regulations, 1936 (Serial No. 1936/86) (as amended by Reg. 2 (2) of Amendment No. 8 (Serial No. 1950/189) ). The relevant portion of Reg. 4 (7) (e) as amended, provides as follows :

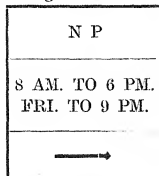
(7) No person or driver in charge of any vehicle not being a bicycle shall stop, stand, or park such vehicle whether attended or unattended in any of the following places or positions :— . . .

(e) In any part of a roadway where a notice, traffic sign, or marking or sign on the roadway is maintained by a controlling authority indicating that the stopping, standing, or parking of vehicles is prohibited: . . .

The main facts were not in dispute. It was admitted that on the date in question the defendant parked his car parallel to the kerb on the east side of High Street in the city of Christchurch, approximately 25 yards south of the corner of High Street and Hereford Street, for a period from 11.25 a.m. to 11.55 a.m. The controlling authority was the Christchurch City Council.

It was further admitted that the Council had erected and maintained two signs, one in High Street on the easterly side on the first pole south of the Hereford Street corner, and a second one on the same side of High Street approximately 3 chains further south. The appellant had parked his car between these two signs.

The northerly of the two signs was as under :



The second sign was the same, except that there was a double arrow pointing both ways. The signs faced outwards to the roadway.

*Brockett*, for the appellant.

*Luscelles*, for the respondent.

*Cur. adv. vult.*

MCGREGOR, J. [After stating the facts, as above:] It is implied from the judgment of *Norcroft*, J., in *Kellar v. Dallison* ([1953] G.L.R. 115) that, if it is desired to make it an offence to disobey any indicated prohibition or restriction, the limits of the area of prohibition or restriction must be indicated clearly and without ambiguity; and I would add that the indication or notice must be such as to give reasonable notice of the prohibition or restriction to a person or persons affected or who might be affected.

The appellant's first complaint is that this is a traffic sign and that it does not comply with the Traffic Sign Regulations, 1937. In the first

place, in particular, he claims that this is a sign of Class D as depicted on Diagram 5B in the Schedule to the Traffic Sign Regulations, 1937 (Serial No. 1954/180 (Reprint) ), and that the excepted times on the sign constitute a supplementary notice in explanation or extension of those given by the sign, and, in the words of Reg. 3 (4) (iii), are required to be placed "*directly under the sign*". It is argued that these excepted times should have been placed below the arrow, and not between the "N P" portion and the arrow. I am not prepared to accept this argument.

It seems to me that, apart from Reg. 3 (4) (iii) being permissible in its language, the operative portion of the sign is the notice prohibiting parking (NP), and the explanation as to permissible hours is placed directly under this portion of the sign and is a reasonable notice to the public of the extent in time of the prohibition. In my view, the arrow is as much explanatory as the portion referring to hours. While the latter is an explanation of time, the former is, in a like manner, an explanation of place. It seems to me immaterial which explanation is placed above the other; the regulation requires, in my view, nothing further than that the explanation or explanations shall be placed directly below the operative portion of the sign. I am prepared to adopt this view, irrespective of the further general argument of counsel for the respondent that the sign is not necessarily a traffic sign, but a "notice" within the meaning of that word as used in Reg. 4 (7) (e) of the Traffic Regulations, 1936.

The appellant further argues that the sign does not sufficiently comply with the provisions of Reg. 3 (15) (d) of the Traffic Sign Regulations, 1937, which reads as follows:

(15) Every erecting authority erecting a traffic sign shall erect the same at such a site, . . . and generally in such a position and manner that . . . it shall— . . .

(d) Give persons approaching it sufficient time for its warning or information to have full value.

The complaint in this regard, as I understand it, is that drivers of vehicles approaching from Hereford Street east and turning south round the acute corner into High Street would pass the more northerly of the two signs without having a real opportunity to observe the information contained thereon; and drivers approaching in a southerly direction through the intersection of Colombo Street, High Street, and Hereford Street, have their attention so occupied by traffic lights and pedestrian crossings at these busy intersections that they would have neither time nor reasonable opportunity to observe and appreciate the information intended to be conveyed.

It seems to me that this argument adopts a somewhat constrained view of the language used. The words used are "warning or information". Different considerations may apply when the object of the notice is to give warning to moving traffic (e.g., a notice giving information as to a necessary reduction of speed owing to an obscure side road), in contradistinction to the position where the object of the sign is to give information to traffic halted or coming to a halt. In the present case, it seems to me that the signs must be considered not individually but collectively. Persons approaching a halt are confronted, or, to my mind, should be confronted, with signs as they are situated in this block at three-chain intervals. Surely a driver coming to a stop, if a reasonable man, having in mind that in this busy city block one would expect some prohibition or restriction on indefinite

- parking, should have sufficient time and be able to obtain the necessary information as to his rights or liabilities; and it seems to me this is reinforced by the fact that similar signs (certainly applying only to the opposite side of the street) face outwards from the opposite kerb and give an additional warning that some restriction is likely. The provisions of Reg. 2 (5b) and (5e) of the Traffic Sign Regulations, 1937 (with the requirements of which the signs with which I am concerned conform) seem to reinforce the view that such requirements of the regulations, at least in the normal case, give persons approaching sufficient time for the information to have full value, time being of much less importance in respect of a parking regulation than in respect of a regulation restricting the freedom of moving traffic. Regulation 2 (5e) seems to me to recognize the sufficiency, in normal cases, of signs parallel to the direction of the side of the roadway to which they relate. It seems to me that the local authority has, in the present instance, given reasonable notice of the place where restriction of the parking of vehicles has been duly imposed, and the signs erected are a sufficient indication of such, and, in the words of Reg. 3 (4) (i) and (ii) respectively, "give reasonable notice" and "signify that parking of motor-vehicles is prohibited".
- In the view I take I do not need to consider Mr. *Lascelles's* further argument that, even if the signs erected in High Street do not comply with the Traffic Sign Regulations, 1937, they are sufficient "notice" within the meaning of this word as used in Reg. 4 (7) (e) of the Traffic Regulations, 1936, but, as at present advised, I would hesitate to accept this argument. Both the Traffic Regulations, 1936, and the Traffic Sign Regulations, 1937, were made pursuant to the authority of the Motor Vehicles Act, 1924, and for their validity now have the authority of the Transport Act, 1949. It seems to me, therefore, that the regulations should be read together. Regulation 3 (4) (i) of the Traffic Sign Regulations, 1937, seems to me to make it mandatory on the controlling authority, subject to the permissive use of supplementary notices as later mentioned in the regulation, to erect Class D notices so as to give reasonable notice of any place where restriction as to parking has been imposed or prohibited: Reg. 3 (4) (ii). It seems to me that the regulations themselves, in such manner, specify what is or is not sufficient notice or indication within the meaning of Reg. 4 (7) (c) of the Traffic Regulations, 1936. But, as I have already held that the signs here used are in conformity with the Traffic Sign Regulations, 1937, I do not need to pursue this argument further.
- The appeal must therefore be dismissed. I allow to the respondent ten guineas costs, together with disbursements (if any) and witnesses' expenses to be fixed by the Registrar.

*Appeal dismissed.*

- Solicitor for the appellant: *G. S. Brockett* (Christchurch).

Solicitors for the respondent: *Weston, Ward, and Lascelles* (Christchurch).





**BUTTERWORTH'S**

**New Zealand**

**Local Government**

**Reports.**

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**MAGISTRATES' COURTS CASES**

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**VOLUME VIII.**

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## KAIRANGA COUNTY v. CROUCHER.

1950. October 24, November 16, before Mr. J. R. HERD, S.M., at Palmerston North.

*Rating—Jurisdiction—Objection by Ratepayer to Inclusion in Rate-book as Occupier—Such Objection pending before Land Valuation Court and not dealt with—Claim for Rates in accordance with Rate-book—Defence that Defendant not "Occupier"—Jurisdiction of Magistrates' Court to determine Rateability—Rating Act, 1925, ss. 6, 9-14, 19, 20, 24—Valuation of Land Act, 1925, ss. 14, 14A—Land Valuation Court Act, 1948, s. 30 (1)—Land Act, 1948, ss. 111, 112.*

*Rating—Licence to occupy Crown Land for Grazing Purposes only—Land occupied by Crown as Military Camp—Members of Forces to enter and remain on Land for Camp or Other Military Purposes—No Exclusive Possession by Licensee—Licensee not "Occupier"—Rating Act, 1925, s. 2.*

The Magistrates' Court has jurisdiction to determine a claim by a local body for rates and penalty owing to it, as it has jurisdiction to decide upon the rateability or otherwise of land in cases where rates are sought to be recovered, whether or not the Land Valuation Court should have dealt with it under s. 14 or s. 14A of the Valuation of Land Act, 1925 (the latter inserted by s. 46 of the Statutes Amendment Act, 1948).

*Hauraki Plains County Council v. Hedley ((1921) 16 M.C.R. 186) followed.*

*Mayor, &c., of Wanganui v. Stanford ((1904) 23 N.Z.L.R. 959) referred to.*

The defendant, in an action claiming rates and penalty alleged to be due, was the licensee under an agreement made with the Crown, whereby he was licensed "to occupy for "grazing purposes" for the term of seven years land which was part of the Crown land occupied as a training camp for Defence purposes:

"subject, however, to a full and free liberty of right of  
"way ingress and egress to the Minister of Defence or  
"any authorized officer of the Defence Department and  
"the servants agents or workmen of the Department on  
"foot or with or without horses and carriages and vehicles  
"of any description including motor-vehicles and tractors  
"and airplanes and also subject to the right of entry and  
"training hereinafter reserved."

Under the agreement, the defendant was obliged to pay all rates imposed on the land. He could graze sheep only; he could not plough or break up into cultivation or crop any part of it; he was responsible for all boundary fences; and he was at liberty to erect temporary subdivisional fences on obtaining the consent of the officer commanding the military camp. Other clauses of the agreement provided that the licensee would at all times allow all members of the New Zealand Defence Forces to enter upon the land and remain thereon for the purpose of holding training

camp or for any other military or defence purpose; that he might be required from time to time to remove his sheep from any part of the land defined by the officer or non-commissioned officer in charge of the members of the Defence Forces using it for any of the above-mentioned purposes; and also that the Crown should have the absolute right at any time to withdraw any part of the land from the licence for the Crown's exclusive use for any purpose, and thereupon the licensee should be entitled to a rebate of the rental.

The defendant was shown on the roll as the occupier of the land, with His Majesty the King as owner. The rate-book upon which the rates were claimed was compiled, in accordance with the Rating Act, 1925, from the valuation roll, in compliance with s. 52 (2) thereof.

The defendant had objected to the valuation by notice to the Valuer-General, and his objection had been referred to the Land Valuation Court and to a Land Valuation Committee under the Land Valuation Act, 1948.

The Committee ruled that the question whether or not he was the occupier of the land was outside its jurisdiction, and this appeared on an Assessment Court sheet signed by the Chairman of the Land Valuation Court.

In an action in which the County claimed to recover for rates and penalties owing in respect of the land occupied by the defendant under the above-mentioned licence,

*Held*, That the Court had jurisdiction to determine the rateability of the land the subject of the licence; and, as the defendant had in no sense exclusive possession of the land which he was licensed to occupy under agreement with the Crown, he was not an "occupier" of any portion of that land within the meaning of that term as used in the Rating Act, 1925.

*Mayor, &c., of Christchurch v. Pyne, Gould, Guinness, Ltd.* ([1928] N.Z.L.R. 318) applied.

*Tonks v. Mayor, &c., of Wellington* ((1908) 27 N.Z.L.R. 617) distinguished.

ACTION in which the plaintiff claimed to recover £105 4s. 11d. for rates and penalty owing in respect of approximately 642 acres, being part sections 167 and 168 Block XIV Kairanga Survey District.

The defendant was shown on the roll as the occupier of the land, with His Majesty the King as owner. The rate-book upon which the rates were claimed had been compiled, in accordance with the Rating Act, 1925, from the valuation roll, in compliance with s. 52 (2) thereof.

The defendant was the licensee under a memorandum of agreement between His Majesty the King and himself, whereby he was licensed "to occupy for grazing purposes" the land concerned (which was part of the Crown land occupied by His Majesty the King at Linton as a training camp for defence purposes):

"subject however to a full and free liberty of right of way  
"ingress and egress to the Minister of Defence or any autho-

"razed officer of the Defence Department and the servants  
"agents or workmen of the Department on foot or with or  
"without horses and carriages and vehicles of any description  
"including motor-vehicles and tractors and airplanes and also  
"subject to the right of entry and training hereinafter  
"reserved for the term of seven years from April 1, 1948."

The licensee was obliged to pay all rates imposed on the land. He might graze only sheep on the land. He was responsible for all boundary fences, and was at liberty to erect temporary subdivisional fences on obtaining the consent of the officer commanding Linton Military Camp.

Clauses 11, 12, and 13 of the agreement were as follows:

"(11) The licensee will at all times during the said term  
"or any extensions thereof allow all members of the New  
"Zealand Defence Forces and all persons authorized by the  
"Minister of Defence or any officer of the said forces to enter  
"upon the said land and remain thereon for the purpose of  
"holding training camps or for any other military or defence  
"purpose.

"(12) The licensee may be required from time to time to  
"remove his sheep from any particular part of the said land  
"to be defined by the officer or non-commissioned officer in  
"charge of the members of the Defence forces using the said  
"land for any of the purposes mentioned in cl. 11 hereof and  
"when such requisition has been made or notice of such  
"requisition given the Crown will not be responsible for any  
"damage or injury done to the licensee's stock on such part  
"of the said land from any cause whatever Providing how-  
"ever that the licensee shall in every case be given reasonable  
"notice and allowed a reasonable time for the removal of his  
"stock.

"(13) The Crown shall have the absolute right at any  
"time to withdraw any part of the said land from the licence  
"hereby granted for its exclusive use for any purpose and  
"thereupon the licensee shall be entitled to a rebate of the  
"rental hereby reserved at an amount to be agreed upon by  
"the parties hereto or as fixed by an arbitrator appointed by  
"them for the purpose."

The licensee was not to plough or break up into cultivation or crop any part of the land.

Evidence was given of active and fairly extensive military exercises, resulting in poor conditions for sheep breeding and raising.

*L. Laurensen*, for the plaintiff.

*A. M. Ongley*, for the defendant.

*Curr. adv. vult.*

HERD, S.M. The defendant has objected to the valuation by notice to the Valuer-General, and his objection has been referred to the Land Valuation Committee under the Land Valuation Court Act, 1948. That Committee has intimated with respect to the objection as follows:

"Croucher's objection that 'I am not the occupier of  
"such property' was not dealt with. The Committee ruled  
"that this was a matter outside its jurisdiction."

This intimation appeared on an Assessment Court sheet and was signed by the Chairman, Mr. Owen Campbell, on March 17, 1950.

Mr. *Ongley*, for the defendant, contends (i) that this Court has no jurisdiction, because there is pending, and not yet dealt with, an objection which should properly be ruled upon by the Land Valuation Committee or the Land Valuation Court, and (ii) that, if this Court has jurisdiction, then it should give judgment in favour of the defendant, because he is not the "occupier" within the meaning of the definition of that term in the Rating Act, 1925.

In connection with his first contention, Mr. *Ongley* has referred to ss. 19, 20, and 24 of the Rating Act, 1925, and argues that it is idle, in view of s. 19, for the Land Valuation Court to say that it has no jurisdiction. Section 19 is as follows:

"Any owner or occupier who considers himself aggrieved  
"by reason of the unfairness or incorrectness of any rateable  
"value in the valuation list, or by reason of the insertion or  
"incorrectness of any matter therein, or the omission of any  
"matter therefrom, may object as herein provided."

Mr. *Ongley's* contention is that such an objection should be referred to an Assessment Court under s. 24 of the Act, and he goes further and says that the Land Valuation Court has the jurisdiction of such Assessment Court.

With this latter contention, however, I do not agree, because it appears to me that the Land Valuation Court has superseded only the Assessment Courts under the Valuation of Land Act, 1925, and not those referred to in s. 24 of the Rating Act, 1925.

I refer to s. 30 (1) of the Land Valuation Court Act, 1948, which reads:

"All Assessment Courts established under the Valuation  
"of Land Act, 1925, are hereby abolished, and all the powers  
"and jurisdiction of those Courts are hereby vested in and  
"may hereafter be exercised by the Land Valuation Court."

It appears to me that those sections of the Rating Act, 1925, to which I have been referred—namely, ss. 19-35—are inapplicable except in the case of a local authority acting upon a valuation list made by valuers under ss. 7 and 8 where the system of rating on the annual value is in force. In this case, I was not informed that this system was in force in the Kairanga County, and I believe that the sections referred to are not applicable.

The procedure for objections under the Valuation of Land Act, 1925, is now contained in s. 14A (as inserted by s. 46 of the Statutes Amendment Act, 1948), being first considered by the Valuer-General and then referred to the Land Valuation Court. Subsection 3 reads as follows:

"Any person to whom notice is given under the last preceding subsection may within fourteen days after service  
"of the notice give written notice to the Valuer-General  
"requiring the objection to be heard by the Land Valuation  
"Court."

Whether or not the objection in the present case was made under that subsection—or, indeed, under s. 14 of the Valuation

of Land Act, 1925—at all, it was in any case referred to the Land Valuation Court. Section 6 (1) of the Rating Act, 1925, states that:

“Where the system of rating on the capital value or on the unimproved value is in force, the valuation roll from time to time supplied by the Valuer-General under the Valuation of Land Act, 1925, shall be the valuation roll for the district.”

It is to be noted that, by subs. 2, for the purposes of every valuation roll, ss. 9-14 of the Rating Act, 1925, shall apply—not, be it noted, either ss. 7 and 8 (dealing with annual rating and valuation lists) or ss. 19-35 (dealing with objections in districts in which rating on the annual value is in force).

It does seem, in any case, however, that this Court has jurisdiction to decide upon the rateability or otherwise of land in cases where rates are sought to be recovered.

I was referred to the decision in *Mayor, &c., of Wanganui v. Stanford* ((1904) 23 N.Z.L.R. 959) and the decision of *Salmon, S.M., in Hauraki Plains County Council v. Hedley* ((1921) 16 M.C.R. 186). The decision in *Stanford's* case ((1904) 23 N.Z.L.R. 959) was that the Judge of an Assessment Court, sitting under the Rating Act, 1894, had no jurisdiction to determine the question of rateability of a property, and had no power to amend the valuation list by striking out a property on the ground that it was not rateable. Referring to the Court of Appeal case, *Mayor, &c., of Auckland v. Speight* ((1898) 16 N.Z.L.R. 651), *Sir Robert Stout, C.J.*, said: “Though the very point that arises in this case was not determined by the Court of Appeal, all the Judges held that the decision of the Assessment Court was not conclusive that the property was rateable. This seems to me necessarily to imply that the decision of a Judge of the Assessment Court on the rateability is not conclusive, and that his function is to decide on the valuation only” (*ibid.*, 962). Later, he said: “No harm is done to the defendants by inserting the 4 acres on the list, for the question of their rateability can be raised when the rate is sued for, as the Court of Appeal has held that the rate-book is not conclusive as to rateability” (*ibid.*, 964).

I therefore hold that I have jurisdiction to deal with this matter, irrespective of whether or not the Land Valuation Court should have dealt with it. In doing so, I am following with respect the learned Magistrate in *Hauraki Plains County Council v. Hedley* ((1921) 16 M.C.R. 186).

The second ground of defence—namely, as to whether the defendant is the occupier of the land within the meaning of the definition of “occupier” in the Rating Act, 1925, and referred to in s. 7 of the Valuation of Land Act, 1925, concerning the preparation of the district valuation roll—appears to me to be the vital matter for decision in this case.

*Mr. Laurensen*, on this question of occupancy, refers to ss. 111 and 112 of the Land Act, 1948, and suggests that the legislation has thereby done what it can with disputes between His Majesty the King and local bodies on matters of rating of Crown land, by making liable for rating Crown lands for any occupancy except those under twelve months.



To my mind, this is not the effect of ss. 111 and 112 of the Land Act, 1948. Section 111 (1) states:

"Subject to the provisions of the next succeeding section, every lessee or licensee shall be liable for all rates, taxes, or assessments of every nature or kind whatsoever *lawfully imposed* upon the occupier of the lands included in his lease or licence during the term for which he is lessee or licensee."

Section 112 (1) provides as follows:

"Where a licence to occupy Crown land is granted under this Act for a term certain not exceeding one year, or on a weekly, monthly, or other tenancy of less than one year, the licensee shall not be liable for rates in respect of the land included in his licence. In every such case the land shall be deemed not to be rateable property for the purposes of the Rating Act, 1925, and for the purposes of the Local Bodies' Loans Act, 1926, and the licensee shall be deemed not to be an occupier within the meaning of either of those Acts."

As to s. 112: I did not agree with Mr. *Ongley's* suggestion that, because of the uncertainty of the term under the defendant's agreement with His Majesty the King, s. 112 made him not liable, because I consider s. 112 is not applicable to this case. It is applicable only to terms certain under one year in the case of licences. I cannot see that it helps either the defendant or the plaintiff.

I have not concerned myself with the question of uncertainty of term as it affects the definition of "occupier," because it relates to tenancies only.

As to s. 111: I have italicized the words "lawfully imposed" in my quotation, because it seems to me that the question of whether or not, in any particular case, the rates are lawfully imposed upon the occupier is not settled by that section. The section deals only with the rates (if lawfully imposed) as between His Majesty the King and the lessee or licensee, and decides that the latter shall be liable.

I must therefore consider the interpretation of the definition "occupier" given in s. 2 of the Rating Act, 1925, the relevant part of which is:

"(a) Means the person by whom or on whose behalf any rateable property is actually occupied, if such person is in occupation by virtue of a tenancy which was for not less than six months certain; and as to rateable property occupied by virtue of a tenancy not coming within the above description, and also in the case of unoccupied rateable property, means the owner of the same; and as to lands of the Crown, whatever may be the term of the tenancy thereof, means the lessee or licensee thereof."

I think I am bound by the decision in *Mayor, &c., of Christchurch v. Pyne, Gould, Guinness, Ltd.* ([1928] N.Z.L.R. 318), where the defendants held a lease of a public reserve for depasturing sheep only, and subject to the public's right of access and to there being no interference with the use made of the land for recreation purposes by sports bodies and others. In that

case, it was held that the defendant, having in no sense exclusive possession of the land purporting to be demised, was not an "occupier" of any portion within the meaning of the Rating Act, 1925.

Mr. *Laurenson's* contention with reference to the cited case is that there was a great limitation of the right of user in that case, whereas, in this case under review, the interference was less and the licensee, knowing there would be some interference, was compensated by the reasonableness of the rent. It appears to me, however, that the decision in this cited case was made upon the question of the exclusiveness of the occupation. *Adams, J.*, said: "The question, therefore, is whether the deed 'creates a tenancy' (*ibid.*, 319). Later, he said: "The word 'license' in the last limb of clause (a) [the definition of 'occupier'] refers to the tenancies created by licence under 'the Land Acts which confer upon the licensee the right of 'exclusive occupation. I am of opinion, therefore, that the 'defendant is not the occupier of any part of the land within 'the meaning of that term in the Rating Act" (*ibid.*, 320).

The learned Judge refers to the decision in *Tonks v. Mayor, &c., of Wellington* ((1908) 27 N.Z.L.R. 617), where an instrument in the form of a deed of lease was held to be a licence not giving exclusive possession, and (*ibid.*, 620) not even giving exclusive occupation.

In view of the Crown's rights under the agreement, and of the uncontradicted evidence as to the exercise of those rights, I cannot hold that the licensee here had exclusive occupation any more than had the defendant in *Mayor, &c., of Christchurch v. Pyne, Gould, Guinness, Ltd.* ([1928] N.Z.L.R. 318), and he is, therefore, not an "occupier."

In *Tonks v. Mayor, &c., of Wellington* ((1908) 27 N.Z.L.R. 617), the defendant was held liable for rates, even though not an "occupier," because of a covenant to pay rates in the deed of lease; but I think that that case is distinguishable, because the covenant to pay there was a covenant with the rating Corporation itself. There was, therefore, a contractual liability *vis-a-vis* the Corporation. In this case, the covenant is with the Crown, and would be operable only in the event of the defendant's being held to be an occupier under the Rating Act, 1925; Crown land such as this is not rateable unless there is an "occupier": see the definition of "rateable property" in the Rating Act, 1925.

Judgment will therefore be for the defendant, with costs according to scale.

*Judgment for the defendant.*

Solicitors for the plaintiff: *Innes and Oakley* (Palmerston North).

Solicitors for the defendant: *A. M. and J. A. Ongley* (Palmerston North).

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## BLAND v. ROBERTSON.

1951. February 20, 27, before Mr. J. H. LUXFORD, S.M., at Auckland.

*Transport—Offence by Driver in charge of Motor-vehicle—Owner's Obligation to give Information as to Driver's Identity—Ingredients of Offence of Failure to give Such Information—Transport Act, 1949, s. 49.*

Section 49 of the Transport Act, 1949, provides that:

"The owner of any motor-vehicle shall, on being informed of any offence alleged to have been committed by the driver of the motor-vehicle while in charge thereof . . . and on being requested so to do by any constable or Traffic Officer, give all information in his possession or obtainable by him which may lead to the identification and apprehension of the driver."

The right of a Traffic Officer to request the owner to supply information in his possession which might lead to the identification of the driver may be exercised solely under the powers specifically conferred by s. 49 of the Transport Act, 1949, without reference to any procedure set out in the Traffic Regulations, 1936. On a charge under s. 49 against an owner, all that the prosecutor has to prove is:

(a) That the owner of the motor-vehicle has been informed that an offence is alleged to have been committed by the driver of the motor-vehicle while in charge thereof.

(b) That the owner has been requested by a Constable or a Traffic Officer to give all information in his possession or obtainable by him which may lead to the identification and apprehension of the driver.

(c) That the owner has failed to comply with such request.

The informing of the owner and the request to the owner may be effected or made in any way, so long as the evidence shows that the information reached the owner and the request was made to him by a Constable or a Traffic Officer.

Section 49 of the Transport Act, 1949, contrasted with s. 32 (2) of the Motor-vehicles Act, 1924 (now repealed).

*Bland v. Brooker* ((1948) 5 M.C.D. 586) distinguished.

INFORMATION charging the defendant with a breach of s. 49 of the Transport Act, 1949, in that he, being the owner of a motor-car, No. 268,827, on being informed of an offence alleged to have been committed by the driver of such vehicle, did fail, when requested so to do by a Traffic Officer, to give all information in his possession or obtainable by him which might lead to the identification of the driver.

The facts were not in dispute. On October 6, 1950, a Traffic Officer saw the car in question in a prohibited parking area for a period of one and a half hours, and placed the customary

parking-ticket on the car. The alleged offence was reported to the City Traffic Department, and inquiries were made to ascertain the name and address of the owner of the car. This information having been obtained, a Traffic Officer on October 11, 1950, communicated with the defendant by telephone, informing him of the alleged offence and requesting him to supply the name of the driver of the car who had parked it in the prohibited area. The defendant said that he had no knowledge of the offence, but that he would make inquiries and let the Traffic Officer know the result. On October 18, 1950, the Traffic Officer called on the defendant, who told him that he thought that one Cummings was the driver of the car; further, that he did not know Cummings's whereabouts at the moment, but would ask Cummings to get in touch with the City Traffic Department. This he apparently did, for on October 24, 1950, Cummings telephoned the City Traffic Department to say that he had borrowed the car but could not remember on which day. On October 30, Cummings again telephoned the City Traffic Department to say that, on the day he borrowed the car, he had returned to the city at a time which made it impossible for him to have committed the parking offence. On November 1, 1950, the Traffic Officer again called on the defendant and told him that Cummings had denied responsibility for the parking offence. The defendant stated that he often lent the car; he did not dispute Cummings's statement; he could not remember who would have had the car on the day in question, and so could not add anything to what he had previously stated.

*G. P. H. Hanna*, for the informant.

*F. L. G. West*, for the defendant.

*Cur. adv. vult.*

LUXFORD, S.M. [After stating the facts, as above:] It is provided by s. 49 of the Transport Act, 1949:

"The owner of any motor-vehicle shall, on being informed  
"of any offence alleged to have been committed by the driver  
"of the motor-vehicle while in charge thereof . . . and  
"on being requested so to do by any constable or Traffic Officer,  
"give all information in his possession or obtainable by him  
"which may lead to the identification and apprehension of  
"the driver."

This section is identical with s. 32 (2) of the Motor-vehicles Act, 1924, except in two respects. First, the request under the Motor-vehicles Act, 1924, had to be made by a Constable or "by any person duly appointed to control or inspect traffic." Under the Transport Act, 1949, the request is to be made by a Constable or by a Traffic Officer. Section 2 of the Transport Act, 1949, defines the expression "Traffic Officer" to mean:

"a Traffic Officer who is an officer of the Transport Department or of a City Council; and includes any other person whose appointment as a Traffic Officer is approved by the Minister."

Secondly, the obligation upon the owner of the motor-vehicle under the Motor-vehicles Act, 1924, was to "give all information in his possession," but under the Transport Act, 1949, his

obligation is to "give all information in his possession or obtainable by him."

In *Bland v. Brooker* ((1948) 5 M.C.D. 586), which was decided at a time when the Motor-vehicles Act, 1924, was in force, I expressed a doubt as to whether a person could be convicted unless the authorized person complied with Reg. 3 (3) of the Traffic Regulations, 1936. As the law then stood, the only authorized persons who could request the owner to supply information were Constables and Traffic Inspectors, and, consequently, it was at least arguable that a request could not be validly made except in accordance with Reg. 3 (3)—namely, by a personal request. The Transport Act, 1949, however, removes this doubt, because a Traffic Officer may not be a Traffic Inspector within the meaning of the Traffic Regulations, although, of course, all Traffic Inspectors are Traffic Officers within the meaning of the Act. Consequently, I am of opinion, that the right of a Traffic Officer to request an owner to supply information may be exercised solely under the powers specifically conferred by s. 49 of the Transport Act, 1949, without reference to any procedure set out in the Traffic Regulations. All that the prosecutor has to prove in a charge against an owner under s. 49 is:

(a) That the owner of the motor-vehicle has been informed that an offence is alleged to have been committed by the driver of the motor-vehicle while in charge thereof:

(b) That the owner has been requested by a Constable or a Traffic Officer to give all information in his possession or obtainable by him which may lead to the identification and apprehension of the driver:

(c) That the owner has failed to comply with such request.

The first two ingredients of the offence to be proved present no difficulty. The informing of the owner and the request to the owner may be effected or made in any way at all, so long as the evidence shows that the information reached the owner and the request was made to him by a Constable or a Traffic Officer.

The third ingredient of the offence is much more difficult to prove, unless the owner ignores the request, or gives information which is proved to be false. In the present case, the defendant gave information to the Traffic Officer, and there is no evidence from which I can infer that it was false. Cummings was not called as a witness, and, for all I know, he may have been the driver who committed the offence. The defendant was informed about the offence five or six days after the offence was committed, and at once made inquiries, and later told the Traffic Officer who he thought was the driver. It was not until another two weeks had passed that the defendant was informed that Cummings had denied being the driver. He then said that he could not give any further information. The prosecution has not proved that he had any further information to give or could obtain any further information. If Cummings was the driver, no further information was possible. I must, therefore, dismiss the information, but would like to add that so important is the obligation placed upon owners of motor-vehicles by s. 49 that Regulations might well be made prescribing a form of questions

which an owner should answer, and verify by statutory declaration, when requested so to do by a Constable or a Traffic Officer.

*Information dismissed.*

Solicitors for the informant: *City Solicitor* (Auckland).

Solicitors for the defendant: *Jackson, Russell, Tunks, and West* (Auckland).

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PENINSULA MOTOR SERVICE, LIMITED v.  
DUNEDIN CITY CORPORATION.

1951. March 2, 13, before Mr. J. D. WILLIS, S.M., at Dunedin.

*Municipal Corporations—Nuisance—Escape of Water from City Main—Damage caused to Bus through Subsidence in Street—Liability of Corporation for Nuisance without Proof of Negligence—Such Liability not Strict or Absolute—Nature of Proof required to fix Liability for Nuisance on Corporation—Municipal Corporations Act, 1933, s. 173.*

The plaintiff's bus, while proceeding along a street under the control of the defendant Corporation, encountered a defect in the roadway, in consequence of which the steering-wheel was wrenched from the driver's hands and the bus swerved to the left, mounted the pavement, and ran into a shop. The bus was extensively damaged. Immediate inspection of the road by the driver showed that there was a large hole in the roadway filled with water at the point where the bus had swerved. It was later found by the defendant Corporation's employees that the water was escaping from the water-main under the roadway, such escape of water being unknown to the defendant Corporation or its servants, or to the plaintiff, or to anyone else until after the accident.

The plaintiff sued the defendant Corporation for damages amounting to £296 11s. 1d., based on nuisance, or, alternatively, on negligence. Counsel concurred in asking the Court to hear preliminary argument on the question whether, on the admitted facts, the escape of water from the main and the effects of such escape upon the soil of the road constituted a public nuisance for which the defendant Corporation was liable without proof of negligence.

*Held*, 1. That the only conclusions which could be drawn from the admissions and the pleadings were that the main was duly laid under statutory authority; the escape of water therefrom was not due to negligence, but was due to some unknown cause, and the defendant Corporation was in ignorance of such escape; and it was conceded that the rule in *Rylands v. Fletcher* ((1868) L.R. 3 H.L. 330) did not apply.

*Irvine and Co., Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741) distinguished.

2. That, in the circumstances, the defendant Corporation would be liable at common law without proof of negligence if it could be established by proved or admitted facts that the condition of things amounted to a nuisance; and, if so, by virtue of s. 173 of the Municipal Corporations Act, 1933, it would be under no statutory immunity or protection in respect thereof.

*Jacobs v. London County Council* ([1950] 1 All E.R. 737) and *Wringe v. Cohen* ([1939] 4 All E.R. 241) referred to.

*Lambert v. Lowestoft Corporation* ([1901] 1 K.B. 590) mentioned.

3. That all that could be taken as proved was that water had escaped from the main under the road, causing an undoubted defect or hazard on the road, but there was nothing to show what caused such escape; and it could not be inferred from those proved facts that there had been a neglect of duty or failure to repair on the part of the defendant Corporation.

4. That, as the liability for nuisance is not a strict or absolute liability, the whole case should be adjourned *sine die* to enable plaintiff's counsel to consider what course he should adopt, because, if the defendant Corporation were not liable in nuisance, the plaintiff would be at liberty to proceed upon the alternative cause of action based on negligence, in which case evidence in the ordinary way would require to be heard.

*Sedleigh-Denfield v. O'Callagan* ([1940] 3 All E.R. 349) followed.

QUESTION OF LAW argued before the trial of an action for damages based on nuisance, or, alternatively, on negligence.

Counsel concurred in asking the Court to hear preliminary argument on the question whether defendant was liable in nuisance, leaving the question of liability for negligence to be dealt with later, if that were found necessary.

Accordingly, for this purpose only, a statement of facts had been agreed upon which was supplemental to the admissions on the pleadings. It was agreed that plaintiff's bus, while proceeding along Anderson's Bay Road, Dunedin, at about 7.25 a.m. on July 12, 1949, encountered a defect in the road at the intersection with Queen's Drive, in consequence of which the steering-wheel was wrenched from the driver's hands, the bus swerving to the left, mounting the pavement, and running into a shop. An immediate inspection of the road by the driver revealed that there was a large hole in the roadway filled with water at the point where the bus had swerved. Water was bubbling up in the hole and running out over the surface of the road. It was later ascertained by defendant's employees that the water was escaping from the water-main under the road. The escape of water from the main in question was quite unknown to the defendant or its servants, or to the plaintiff, or to anyone else

until after the accident, and, within a short time of its discovery, the dangerous area was railed off and the flow of water shut off. Another bus belonging to the plaintiff had without mishap passed through the same area about a quarter of an hour before. It was impossible to say whether the hole was actually in existence at the time of the accident, but the bus must at any rate have sunk in the ground at the spot in question as a result of the weakening of the road by the escape of the water. It was dark at the time, and raining, though the latter fact had no bearing on the case.

It was agreed that Anderson's Bay Road, where the accident occurred, was a "street" within the definition contained in s. 174 of the Municipal Corporations Act, 1933, and it and the soil and materials thereof were vested in the defendant Corporation in fee simple by virtue of s. 175 (1) of that Act; and the street was under the control of its Council by virtue of s. 175 (2). The water-main referred to was part of certain waterworks constructed and maintained by the defendant Corporation in exercise of the powers conferred on it by Part XX of that Act and for the purposes set forth in s. 245 thereof; and the water that escaped from the main was being conveyed therein by the defendant in the exercise of those powers and for the use of the inhabitants of the City.

*H. S. Adams*, for the plaintiff.

*A. N. Haggitt*, for the defendant.

*Curr. adv. vult.*

WILLIS, S.M. [After setting out the facts, as above:] The particular point of law which the Court is asked to determine is whether, on the admitted facts, the escape of water from the main, and the effects of such escape upon the soil of the road, constituted a public nuisance for which the defendant is liable without proof of negligence. It should be added that the bus is alleged to have been extensively damaged as a result of the accident, and in respect thereof the plaintiff claims damages in the sum of £296 11s. 1d.

If it be found that the defendant is not liable in nuisance, then plaintiff is, of course, at liberty to proceed upon the alternative leg of its claim, based on negligence, in which case evidence in the ordinary way would require to be heard. The present procedure was apparently thought by counsel to be a convenient way of ascertaining if the proceedings could be shortened.

For the plaintiff, it is submitted that, in the circumstances outlined, the defendant is liable on the ground of nuisance, without proof of negligence, Mr. *Adams* relying largely on the decision of the Court of Appeal in *Irvine and Co., Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741). It will be seen that not only (for the purpose of the present argument) does the plaintiff make no allegation of negligence, but also there has been no investigation into the actual cause of the escape such as is usual in this type of case. The only conclusions which the Court can draw from the admissions and the pleadings are that the main was duly laid under statutory authority, that



the escape of the water therefrom was not due to negligence, but was due to some cause unknown, and that the defendant was in entire ignorance of such escape. In *Irvine and Co., Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741), the defendant was held liable in damages for the escape of water from a street main into the adjoining basement of the plaintiff's premises. The Court of Appeal simply decided that the proved facts justified a claim based on nuisance, and that s. 173 of the Municipal Corporations Act, 1933, applied both to public and to private nuisances. In actual fact (although, for present purposes, it is of no moment), the plaintiff succeeded on the doctrine of strict liability laid down in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, and without proof of negligence. This rule is, of course, subject to certain qualifications and defences, none of which could be relied upon by the defendant in that case. In the case now before me, it was properly conceded by both counsel that the principle established in *Rylands v. Fletcher* does not apply.

The question which I have to determine is whether, on the agreed facts, the defendant Corporation is liable in nuisance at common law; if so, it is, by virtue of s. 173 above referred to, under no statutory immunity or protection in respect thereof. On the general question of liability in nuisance, the decision in *Irvine's* case ([1939] N.Z.L.R. 741) is of little or no assistance, based as it was, as I have said, on the rule in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330. In *Jacobs v. London County Council* ([1950] 1 All E.R. 737, 744), *Lord Simonds* refers with obvious approval to a definition stated in *Pratt and Mackenzie's Law of Highways*, 18th Ed. 107:

"Nuisance may be defined, with reference to highways, "as any wrongful act or omission upon or near a highway, "whereby the public are prevented from freely, safely, and "conveniently passing along the highway."

After drawing attention to the warning of *Lord Sumner* (then *Hamilton, L.J.*) in *Latham v. R. Johnson and Nephew, Ltd.* ([1913] 1 K.B. 398) that "the differences between cases of "nuisance and cases of negligence must never be lost sight "of" (*ibid.*, 413), *Lord Simonds* added: "It will, as I think, "help to keep sight of those differences, if two propositions "are maintained, first, that negligence is not necessarily an "element in nuisance, and, second, that, where the nuisance, "in respect of which a private person sues, is a 'public nuisance,' "he has no personal right of action, unless he can prove special "damage beyond that suffered by other members of the public" ([1950] 1 All E.R. 737, 744). I shall assume for the moment that the plaintiff here has suffered some damage or other to its bus.

In *Sedleigh-Denfield v. O'Callaghan* ([1940] 3 All E.R. 349), *Lord Romer* had earlier emphasized that: "It is well-settled "that a private individual, who suffers damage from a public "nuisance greater than that sustained by the public in general "is entitled to sue in respect of that damage. So far as he "is concerned, the nuisance is a private nuisance, and his rights "and remedies in respect of both kinds of nuisance are to be

"ascertained on precisely the same footing" (*ibid.*, 371). The opinions of others of their Lordships contain similar statements.

In *Wringe v. Cohen* ([1939] 4 All E.R. 241), the landlord of certain premises was liable to keep them in repair. A wall of those premises, which appears to have been in bad repair for some time, collapsed and damaged an adjoining shop. There was evidence that the premises had become a "nuisance" (in the popular sense of that term), but not that the landlord was aware of that fact. *Atkinson, J.*, in delivering the judgment of the Court of Appeal, said: "if the nuisance is created, not "by want of repair, but, for example, by the act of a trespasser, "or by a secret and unobservable operation of nature, such as "a subsidence under or near the foundations of the premises, "neither an occupier nor an owner responsible for repair is "answerable, unless with knowledge or means of knowledge he "allows the danger to continue. In such a case, he has in no "sense caused the nuisance by any act or breach of duty" (*ibid.*, 243). And the judgment of the Court concludes as follows: "On the other hand, if premises become dangerous, "not by the occupier's act, nor neglect of duty, but as the "result of the act of a third party, or of a latent defect, the "occupier is not liable without proof of knowledge or means "of knowledge and failure to abate it" (*ibid.*, 254).

Cases following the doctrine of *Rylands v. Fletcher* ((1868) L.R. 3 H.L. 330) are thus no doubt distinguishable from ordinary cases of nuisance, for the reason, amongst others, that, in the latter, proof that the defect giving rise to the nuisance was a latent one is a sufficient defence. The defect must be latent not only in the sense that it is not apparent but also in the sense that it was not known to the occupier or owner (as the case may be).

An illustration of a secret and unobservable operation which caused a nuisance is afforded by *Lambert v. Lowestoft Corporation* ([1901] 1 K.B. 590), where a sewer under the highway collapsed, causing the crown of the road to give way and injure a horse passing along the highway. It was found that there was no negligence in the construction or maintenance of the sewer, but that the collapse was due to one of the joints of the sewer being worked away by rats. In an action based on nuisance, it was held that the authority responsible for the maintenance of the sewer was not liable, as there was nothing to warn it of the defect in the sewer, and it could not have discovered the hole under the road by the exercise of reasonable care. True it is that there appears to have been no "nuisance "clause" in any authorizing legislation, but, even if there had been, it would have made no difference, because the condition of things did not amount to a nuisance in law. In *Irvine and Co., Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741), it was made perfectly clear that it was quite open to the defendant, in spite of the existence of s. 173 of the Municipal Corporations Act, 1933, to have raised various grounds of defence to the action there based on nuisance; but, on the facts, none could be suggested.

In the present case, it must be established on proved or admitted facts that the condition of things amounted to a nuisance. If that be done, I agree that liability would exist

quite apart from negligence. But all that can be taken as proved is that water escaped from the main under the road, causing an undoubted defect or hazard on the road. There is nothing whatever to show what caused it to escape from the main. It may have been due to some such reason as appeared in *Lambert v. Lowestoft Corporation* ([1901] 1 K.B. 590), or to a slight earthquake's breaking joints in the main—as to which, compare the unreported case referred to by *Sir Michael Myers, C.J.*, in the concluding paragraph of his judgment in *Irvine and Co., Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741, 767, l. 31)—or to some latent defect. On the short statement of agreed facts, it cannot be inferred that there has been a neglect of duty or failure to repair on the part of the defendant, and it is conceded that the rule in *Rylands v. Fletcher* ((1868) L.R. 3 H.L. 330) does not apply. The liability for nuisance is not, at least in modern law, a strict or absolute liability: *Sedleigh-Denfield v. O'Callagan* ([1940] 3 All E.R. 349) per *Lord Wright* (*ibid.*, 365). It may well be that, if further facts were proved, liability even in nuisance could be established; but, for the purposes of this judgment, I must adhere to the statement of facts agreed upon. Had the water been allowed to continue to spill over the road for a lengthy period and nothing been done about it, perhaps the defendant, with means of knowledge, would have been liable for failure to abate a continuing nuisance; but this point does not arise for consideration, and I express no view on it.

I therefore propose to adjourn the whole case *sine die*, to enable counsel for plaintiff to consider what course of action he should now adopt. If necessary, both counsel may see me in Chambers to discuss the matter.

*Hearing of action adjourned.*

Solicitors for the plaintiff: *Adams Bros.* (Dunedin).

Solicitors for the defendant: *Ramsay, Haggitt, and Robertson* (Dunedin).

#### THE KING v. FLEMING.

1951. June 25, July 2, before Mr. J. H. LUXFORD, S.M., at Rotorua.

*Contract—Electricity Supply—Contract by Supply Authority providing for Minimum Annual Payment for Electrical Energy supplied—Rationing of Power imposed—Refusal by Consumer to pay Excess over Minimum Charge—Action by Crown for Payment thereof—No Proof of Consumer's requiring More Electrical Energy than supplied to Him—Any Action by Consumer against Supply Authority barred—Electricity Act, 1945, ss. 3 (2) (b), 22A (1)—Statutes Amendment Act, 1949, s. 12—Electricity Control Regulations, 1949 (Serial No. 1949/190), Reg. 5 (1).*

The material parts of an agreement made on June 25, 1948, between the Minister of Tourist and Health Resorts (as the Supply Authority for the district) and the defendant were as follows:

"2. The consumer agrees to pay a minimum charge  
"of £40 per annum (due and payable monthly) for a  
"period of five years.

" 3. The above-quoted charge of £40 is a minimum charge only. If the charges for the apparatus installed either by meter or by assessment be greater than £40 such greater amount shall be paid.

" 4. The charge for energy supplied shall be computed in accordance with Clause 35 of the Department By-laws . . . ."

The Minister made the necessary extensions, and the defendant on or about August 20, 1948, received a supply of electrical energy for domestic purposes and for working certain farming-plant.

The power shortage in the North Island had already commenced. The minimum charge of £40 a year was, by agreement, reduced to £30 a year. On account of the shortage, the defendant was given a quota of 530 units a month for domestic purposes. For the period August 20, 1948, to October 28, 1950, he had paid £45 5s. 4d. He alleged that, in consequence of the imposition of the quota, he had been prevented from using sufficient power in a year to equal the amount to which a payment of £30 would entitle him. He refused to pay the difference between the minimum charge of £30 a year and the charges for electrical energy actually consumed. The plaintiff claimed that difference, amounting to £19 14s. 8d.

*Held*, 1. That the agreement, standing alone, obliged the Supply Authority to supply the defendant with any amount of electrical energy which he might require; but, as the defendant had not proved that he required more electrical energy than had been supplied to him, he had shown no grounds upon which he could be excused from discharging his obligation to pay the annual minimum charge.

2. That, when the Supply Authority became empowered, by virtue of the Electricity Control Regulations, 1949, to ration the use of electrical energy, any action against it by the defendant, whether by claim or by counter-claim, seeking relief on the ground put forward by him was barred by s. 22A (1) of the Electricity Act, 1945.

ACTION by the Crown claiming the sum of £19 14s. 8d. alleged to be due and owing by the defendant for the supply of electric power. The amount claimed was small, but claims were pending against a large number of users of electric power, and the present action was brought as a test case.

For some years before 1948, the settlers in the Kaharoa district near Rotorua endeavoured to have their properties supplied with electric power for domestic and commercial use. The Electrical Supply Authority for the area in which the Kaharoa district was situated was the Minister of the Department of Tourist and Health Resorts acting by and through the District Manager for the time being at Rotorua. The Authority decided to comply with the request of the Kaharoa settlers, subject to each of them entering into an agreement designed to secure the revenue required to cover the annual costs involved in taking electric power to their district.

The agreement entered into between the Minister and the defendant was dated June 25, 1948. The material parts of the agreement were cls. 2, 3, and 4, which provided as follows:

"2. The consumer agrees to pay a minimum charge of £40 per annum (due and payable monthly) for a period of five years.

"3. The above-quoted charge of £40 is a minimum charge only. If the charges for the apparatus installed either by meter or by assessment be greater than £40 such greater amount shall be paid.

"4. The charge for energy supplied shall be computed in accordance with Clause 35 of the Department By-laws . . . ."

The Authority made the necessary extensions, and the defendant received a supply of electric energy for domestic purposes and for working certain plant used in connection with his farming business on or about August 20, 1948.

The power shortage in the North Island had already commenced. Whether because of this or not the evidence did not disclose, but it was common ground that the minimum charge of £40 a year was, by mutual agreement, reduced to £30 a year. The defendant, however, because of the shortage, was given a quota of 530 units a month for domestic purposes. In consequence of this, he alleged that he had been prevented from using sufficient power in a year to equal the amount to which a payment of £30 would entitle him. He and the other settlers who were similarly placed refused to pay anything above the agreed charges for the electrical energy actually consumed. For the period August 20, 1948, to October 28, 1950, the defendant had paid £45 5s. 4d., and the plaintiff now claimed £19 14s. 8d., being the difference between the minimum charge of £30 a year and the charges for energy actually consumed.

*E. Roe, for the Crown.*

*R. A. Potter, for the defendant.*

*Cur. adv. vult.*

LUXFORD, S.M. [After stating the facts, as above:] Mr. Potter contends that the agreement of June 25, 1948, bound the Supply Authority to supply such electric energy as the defendant should require, and that the imposition of a quota amounted to a novation, with the result that the obligation to pay a minimum annual charge for five years ceased to apply.

The obligation to pay a minimum charge for five years is explained in the following portions of the agreement:

"Whereas the said John Richard Fleming has applied to the Minister for a supply of electric power for use on his property situated at Kaharoa . . . and whereas it is necessary to erect a new distribution line to give supply to the consumer the Minister agrees to erect the required new lines and to give supply on the receipt of guarantees which will secure the revenue required to cover the annual costs involved in the extensions and the consumer undertakes to take supply of electrical energy as he may require, subject to the Department's Regulations and By-laws governing

"supply, and in accordance with the following special conditions [which include Clauses 2, 3, and 4 already referred to]."

This excerpt makes it clear that the Supply Authority agreed to erect the required new lines and to give supply subject to the Authority's Regulations and By-laws governing supply on receipt of guarantees which would secure the revenue required to cover the annual costs involved in the extensions. The phrase "receipt of guarantees" obviously refers to similar agreements being entered into by a sufficient number of settlers in the district. It was stated in evidence at the hearing that the total costs of erecting the new lines was in the vicinity of £11,000, or a sum of £616 for each settler who signed an agreement similar to the agreement of June 25, 1948.

The primary purpose of the agreement was to secure the revenue required to cover the annual costs involved in the extensions, and this was done by requiring the consumer to pay an annual minimum charge of £30. The consumer, however, was bound "to take supply of electrical energy as he may require," subject also to the Authority's Regulations and By-laws governing supply. These Regulations and By-laws were not produced at the hearing, so I must assume that they contain nothing which is relevant to the case.

The agreement, standing alone, creates, in my opinion, an obligation on the Supply Authority to supply the defendant with any amount of electric energy which he may require; it also creates an obligation on the defendant to pay £30 a year to the Supply Authority or the actual prescribed charges for electric energy supplied to him, whichever is the greater. If, therefore, the Supply Authority failed to supply the full amount of electric energy the defendant required, he would be entitled, in certain circumstances, to repudiate the agreement, or, in any event, to recover by way of damages any loss he has suffered by reason of the Authority's breach of contract. He has not, however, filed any counterclaim, nor has he proved that he required any more electric energy than the amount that has been supplied to him. The rationing period commenced on January 1, 1949. During the next fourteen months, the defendant could have used 7,420 units for domestic supply and an unlimited amount for working the plant used in connection with his farming business. In point of fact, he used only 6,115 units for domestic purposes and 23 units in connection with his farming business. It is true that the defendant, in common with all other responsible members of the community, economized as much as possible in the use of electric energy, because of the known shortage; but he has not proved that he required more than was supplied to him. For these reasons alone, the defendant has shown no grounds upon which he can be excused from discharging his obligation to pay the annual minimum charge.

There is, however, a further ground upon which the defendant's claim must fail. The functions of the State Hydro-Electric Department include, as is enacted by the Electricity Act, 1945, s. 3 (2) (b), as added by the Statutes Amendment

Act, 1949, s. 11, "Regulating, controlling, allocating, and, when-  
"ever in the opinion of the General Manager it is necessary,  
"restricting or preventing the use of electrical energy." The  
Electricity Control Regulations, 1949 (Serial No. 1949/190),  
confer upon the General Manager such powers as may appear to  
him necessary to carry out any of the functions of the Depart-  
ment just referred to and to delegate those powers to a Supply  
Authority. The Supply Authority in the present case thus  
became empowered to ration the use of electric energy. It is  
provided by s. 22A (1) of the Electricity Act, 1945 (as it now  
appears consequent upon the passing of the Statutes Amendment  
Act, 1949, s. 12):

" . . . no action, claim, or demand whatsoever shall lie or  
"be made or allowed by or in favour of any person against the  
"Crown . . . or any . . . supply authority . . .  
"for . . . any damage, loss, injury or expenses sustained  
"or incurred . . . by reason of anything . . .  
"ordered or directed, in the exercise . . . of any of the  
"functions specified in subsection two of section three of this  
"Act, whether under the authority of this Act or of any  
"regulations made thereunder and relating to any such  
"function as aforesaid, or under the authority of any orders  
" . . . made, given, or imposed under this Act or any such  
"regulations and relating to any such function as aforesaid."

This section, in my opinion, covers the present case. The  
defendant alleges that he has suffered a loss by reason of the  
rationing of electric energy, in that he is under an obligation  
to pay an annual minimum charge which, at the prescribed rates,  
amounts to more than he would be required to pay for the  
electric energy he is allowed to consume. Even assuming that  
the allegation is literally true (which it is not, because there is  
no restriction upon the amount he uses in connection with his  
farming business), s. 22A (1) is a complete bar to any action,  
whether by claim or counterclaim, seeking relief on the grounds  
put forward by him.

Judgment will therefore be entered for the plaintiff for  
the amount claimed, with costs according to scale.

*Judgment for the Crown.*

Solicitors for the Crown: *Urquhart, Roe, and Keane*  
(Rotorua).

Solicitor for the defendant: *R. A. Potter* (Rotorua).

FISCHER v. DAIRY FARMERS' CO-OPERATIVE  
MILK SUPPLY COMPANY, LIMITED.

1951. June 11, 21, 22, July 2, before Mr. J. D. WILLIS, S.M., at Dunedin.

*Food and Drugs—Cream—Defendant Company selling Cream to Retail Vendor—Property in Cream passing from Defendant when Cream collected on Retailer's Behalf—Sample taken by "officer" from Container in Retailer's Possession—Retailer "person selling"—Inspector, as Common Informer, proceeding against Defendant—Defendant convicted—Food and Drugs Act, 1947, ss. 2, 6 (2) (a), 12 (1), 15, 16.*

Cream sold by the defendant to one P. for resale to the public after it had been separated by the Government Treatment Station failed substantially to comply with the prescribed reductase test. It was fresh when the defendant uplifted it from the Treatment Station. P.'s container was in proper condition to receive his cream, and the sale to P. had been completed when an Inspector, who was an "officer" under the Food and Drugs Act, 1947, took the sample.

The defendant was charged with selling to P. cream which did not comply with the standard prescribed therefor by Reg. 104 of the Food and Drug Regulations, 1946, in that it failed to comply with the prescribed reductase test.

*Held*, 1. That, at the time when the sample was taken, P., and not the defendant, was "the person selling" within the meaning of s. 15 (1) of the statute.

*Cruickshank v. Hughey* ([1951] N.Z.L.R. 540) followed.

2. That the "officer" (within the definition of that term in s. 2 of the statute) who took the sample of P.'s cream was under the duty of complying with ss. 15 and 16 in respect of P., and he performed that duty; and thereafter the same officer, finding that the defendant had offended against s. 6 (2) (a), was entitled to proceed against the defendant as a common informer who had discovered that a breach of the law had been committed.

*Middleton v. Incledon* ((1914) 34 N.Z.L.R. 182) referred to.

3. That the property in the cream passed from the defendant to P. when it was collected on P.'s behalf at 2.30 a.m. on April 5, and not when the cream was put into P.'s container at about 9.30 a.m. on April 4.

4. That the defendant had not discharged the onus cast upon it by s. 7 of proving affirmatively that it had taken all reasonable steps to ascertain that the sale of the cream would not constitute an offence.

*Canterbury Central Co-operative Dairy Co., Ltd. v. McKenzie* ([1923] N.Z.L.R. 426) followed.

*Wellington Fresh Food and Ice Co. v. Janes* ((1911) 31 N.Z.L.R. 192) referred to.



INFORMATION charging the defendant under the Food and Drugs Act, 1947, with selling on April 5, 1951, to one Paisley, cream which did not comply with the standard prescribed therefor by Reg. 104 of the Food and Drug Regulations, 1946, in that it failed to comply with the reductase test prescribed in the Fifth Schedule to those Regulations. The information was laid by one Albert George Fischer, the District Inspector of Health at Dunedin, who was an "officer" under the Act. In spite of the extraordinary length of time which the hearing of the case occupied, the relevant facts came within a reasonably small compass.

The defendant company purchased milk from farmers, and on April 4, in accordance with a regular procedure, it sent a large quantity to the Government Milk Treatment Station at Dunedin to be separated. The separation was duly completed, and about 41 gallons of cream were available to be picked up by the defendant at the Treatment Station at approximately 4.30 p.m. on April 4. In fact, it was collected at about 8.30 p.m. Twenty-six retail milk vendors, whose business it was to deliver milk and cream to the public, and who purchased their cream for this purpose from the defendant, had earlier the same day left their respective empty cream containers at the defendant's "cool room" for the purpose of having their orders for cream fulfilled. An employee of the defendant between 8.30 p.m. and 9.30 p.m. on April 4 placed in each container, from the supply just received from the Treatment Station, the amount of cream which each vendor had previously ordered. This was done in the cool room, where the containers were left by him to be taken away some hours later by the retailers. One Watson collected his own and Paisley's cream from the cool room at about 2.30 a.m. on April 5, and, almost immediately after he had taken delivery, and while he was still there, an Inspector, an "officer" under the Act, but not the present informant, purchased from him a half-pint of Paisley's cream, paying to Watson, as Paisley's agent, the correct price of 1s. 6d. therefor. The Inspector told Watson that the cream was purchased for the purpose of analysis, and, so far as Paisley was concerned, the Inspector duly complied with the provisions of ss. 15 and 16 of the Food and Drugs Act, 1947. A sample was sent to the Government Analyst, who commenced the reductase test about 8.30 a.m. The sample so analysed, forming part of 5 pints of cream sold by the defendant to Paisley, did not comply with Reg. 104 above-mentioned, in that it completely decolorized the methylene blue in two hours as against the permitted minimum of four hours. Section 16 of the Act was admittedly not complied with as regards the defendant, no sample having been supplied to the defendant by the Inspector.

*J. B. Deaker*, for the informant.

*J. P. Ward*, for the defendant.

*Cur. adv. vult.*

WILLIS, S.M. The facts can be shortly summarized by saying that cream sold by defendant to Paisley for resale to the public after having been first separated by the Government Treatment Station failed substantially to comply with the prescribed reductase test. I expressly find that the cream was fresh

when the defendant uplifted it from the Treatment Station (a test of a sample retained at the Station established that), that Paisley's container was in proper condition to receive his cream, and that the sale to Paisley had been completed when the sample was taken. The manager of the defendant company stated, in answer to questions put to him by the Court, that, if the cream was fresh when it was put into Paisley's container about 9 p.m. on April 4, it should have satisfied the reductase test until at least 9 p.m. on April 6, if it had been standing in a temperature of 40° F. between 9 p.m. on April 4 and 2.30 a.m. on April 5, when it was collected from Paisley (though one assumes in fairness to him that after 2.30 a.m. on April 5 it would have required to have remained at a reasonable temperature), and, further, that in any event it should have complied with the reductase test made by the Government Analyst at 8.30 a.m. on April 5, if it had been left at a temperature of 48° F. between the same hours. It has been established beyond doubt that a thermometer in the cool room showed the temperature to be 46° F. when the sample was taken by the Inspector. It has been further established that a temperature of not more than 40° F. would have been the correct temperature to have been maintained there. The plain fact is that the cream of which Paisley took delivery by his agent in the circumstances already outlined did not, within a reasonable time thereafter, comply, as it should have done, with the reductase test. It is not disputed that Paisley could have been successfully prosecuted under s. 6 of the Act, he being the actual owner of the cream when the sample was taken, and the "officer" having complied with all the statutory requirements so far as he was concerned; the authorities, however, have chosen to proceed against the present defendant, as the supplier to Paisley for resale to the public. It is only fair to add that, although other milk vendors besides Paisley had inferior cream supplied to them by the defendant at the time in question, still others were supplied, allegedly from the same source, with perfectly fresh cream which satisfied the reductase test. The Court is mercifully not required to hazard any opinion as to why this should have been, and none of the experts who gave evidence could give a satisfactory explanation for it on the available facts. It is perfectly clear that the cream had not been subjected to any contamination between the time Paisley uplifted his container of cream and the time when the sample was taken, almost immediately afterwards, by the Inspector.

Counsel for defendant has raised certain technical defences. First, he submitted in effect that, even if the property in the cream had passed to Paisley before the sample was taken, nevertheless the Inspector should have given a portion of the sample to the defendant, and his failure to do so is fatal to the charge, on the ground that, so far as the defendant was concerned, ss. 15 and 16 of the Act have not been complied with, and, consequently, the proviso to s. 12 (1) (c) precludes proceedings against the defendant under s. 6; and that Fischer, the present informant, also an "officer" under the Act, could not seek to remedy the position by acting in the capacity of a common informer, he at all times himself having acted as an "officer." I confess that I am unable to appreciate the force of this submission. Sections 15 and 16 have been judicially noticed in

*Middleton v. Incledon* ((1914) 34 N.Z.L.R. 182) and in *Lincoln v. Sole* ([1939] N.Z.L.R. 176), and the effect of these decisions is tolerably clear. Any person may lay an information charging a person with a breach of s. 6, and the provisions of ss. 12, 15, 16, and 17 of the Act need not be complied with in such a case, except where an "officer" is proceeding under the special provisions of those sections. In the latter case, *Reed, J.*, made it clear (*ibid.*, 179) that any person, without complying with the provisions of the sections regulating the powers of an officer, was empowered to take proceedings against an adulterator of food under the section corresponding with s. 6 of the present Act. The matter was canvassed again only recently before *Northcroft, J.*, in *Cruikshank v. Hughey* ([1951] N.Z.L.R. 540), which also seems to me effectively to dispose of Mr. Ward's submission. The essential facts in this latter case bear a marked resemblance to those in the present case, and the principles affirmed there by the learned Judge are certainly applicable here. At the time when the sample was taken, Paisley, and not the defendant, was the "person selling . . . food" within the meaning of s. 15 (1). That being so, the above submission fails, as a similar one failed in *Cruikshank v. Hughey* ([1951] N.Z.L.R. 540), as it is common ground that the correct procedure was adopted as far as Paisley is concerned. Adopting and adapting the language of *Northcroft, J.* (*ibid.*, 545, l. 18), it seems to me that the proper view to take of the circumstances of this case is that the "officer" who took the sample of Paisley's cream was under a duty to comply with the special machinery provisions of the statute in respect of Paisley, and this he did. Thereafter, finding as a consequence of the investigation that the defendant had offended against s. 6 (2A), the same officer was entitled to proceed, as was done in *Middleton v. Incledon* ((1914) 34 N.Z.L.R. 182), against the defendant, proceeding not as an "officer" under the special provisions of the Act, but as a common informer who had discovered that a breach of the law had been committed by defendant. That being so, I entirely fail to see why another "officer" altogether—namely, the present informant, Fischer—has not also the same right to proceed against defendant, again not as an "officer," but as a common informer. The "officer" taking the sample having the right to lay the information against defendant as a common informer, surely Fischer is in a similar position. The fact that Fischer had previously sent to defendant an official routine notice stating that the taking of legal proceedings was under consideration, signing such notice "For Medical Officer of Health," has not the slightest bearing on the matter.

Mr. Ward's next submission, as I understand it, was that the property in the cream passed from defendant to Paisley when the cream was put into the latter's container at about 9.30 p.m. on April 4, not when Watson collected it on Paisley's behalf at 2.30 a.m. on April 5, and that, consequently, the Analyst's report was not available to the informant as proof of the deterioration of the cream after 9.30 p.m. on April 4—in other words, that the defendant was not liable for any deterioration after 9.30 p.m. on April 4 and before collection on behalf of Paisley some five hours later. This submission is based on rule 5 of s. 20 of the Sale of Goods Act, 1908—that there was a con-

tract for the sale of unascertained or future goods by description, and goods (cream) of that description and in a deliverable state were unconditionally appropriated to the contract by the seller (the defendant) with the assent of Paisley (the buyer) at approximately 9.30 p.m. on April 4, and the property in the cream thereupon passed to the buyer, such assent being implied, and given before the appropriation was made by defendant. One Alexander MacAskill, an employee of the defendant, deposed that he was on duty in the cool room on April 4 and that he was the person whose duty it was to fulfil the retailers' orders by putting the requisite amounts of cream into their respective containers from the 41 gallons received at 8.30 p.m. from the Treatment Station as already mentioned. He said that Paisley adopted a method of ordering cream which was the common practice with the retailers—namely, that Paisley signed and delivered to defendant at the cool room on April 4 an order for 5 pints of cream, but stating expressly that it was required on April 5. It is obvious that, after MacAskill had put cream into Paisley's container, he could have tipped it out again and substituted another lot, and so on indefinitely. There is not the slightest evidence of any such assent, either express or implied. The fact that MacAskill charged the cream up to the retailer on April 4 is immaterial. The defendant normally provides a freezing service in the cool room to keep the cream fresh until it is collected by the retailers after having been put in the containers five hours earlier, although for reasons stated to be beyond the control of defendant, it was not in operation on the night in question. I find difficulty in believing that a trading company in the position of the defendant would be so benevolent as voluntarily to go to the trouble and expense of providing such a service free. It is a reasonable assumption that it recognizes a liability to preserve the cream fresh until the retailer collects it. In my opinion, then, the property in the cream passed on April 5, when Paisley took delivery of it.

Mr. Ward's final submission was that, even if an offence had been committed, the defendant was entitled to the protection afforded by s. 7 of the Act, in that the defendant did not act wilfully. The Act was passed for the protection of the public, and throws the responsibility for the sale of food upon the vendor. A defence of absence of *mens rea* is not open to a defendant unless he proves affirmatively (s. 7) that he took all reasonable steps to ascertain that the sale would not constitute an offence, or he obtained (s. 8) a written warranty as to the nature of the article sold. His almost absolute responsibility is illustrated by several cases: *Wellington Fresh Food and Ice Co. v. Jones* ((1911) 31 N.Z.L.R. 192). The effect of s. 7 has been judicially determined. Speaking, in *Canterbury Central Co-operative Dairy Co., Ltd. v. McKenzie* ([1923] N.Z.L.R. 426, 428), of the corresponding section of the Act of 1908, *Chapman, J.*, pointed out that an acquittal on the grounds specified in the section is not secured by showing that in the ordinary sense reasonable care has been taken; the very words of the section must be pursued, and a defendant must prove that all reasonable steps have been taken to avoid an offence. The onus is on him to show that, within practical limits, no other steps could have been taken. It may be added that the question is

one of fact in each particular case, and the Court is not called upon to determine why the cream failed to comply with the reductase test. As was pointed out by *Hosking, J.*, in *Bodley v. Rawlinson* ([1918] N.Z.L.R. 726, 728), while s. 7 may be regarded as an attempt to grant some concession to the honest and diligent vendor, in many cases it may be found to be a provision affording no substantial relief. The defendant clearly has not discharged the onus cast upon it by s. 7.

Another submission made on behalf of defendant was subsequently abandoned in Chambers, and does not now fall to be considered.

In the result, therefore, the defendant is convicted.

*Defendant convicted.*

Solicitors for the informant: *Adams Bros.* (Dunedin).

Solicitors for the defendant: *Ward and Dowling* (Dunedin).

[Appeal dismissed. Dunedin. October 2, 1951. Fell, J.]

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### HAZELDON v. GIGGER.

1951. May 24, June 15, before Mr. J. HESSELL, S.M., at Wellington.

*Transport—Heavy Motor-vehicles—Tractor with Trailer designed to carry Excavator—Tractor licensed as Class K Vehicle—Trailer not licensed—Tractor with Single Trailer forming One Heavy Motor-vehicle if Trailer liable for Licence Fee—Trailer designed to carry Machinery exempted from Payment of Licence Fee—Exempted Vehicle's Identity not lost by Attachment to Heavy Motor-vehicle—Transport Act, 1949, s. 21 (1)—Motor-vehicles (Licensing Fees Exemption) Regulations, 1948 (Serial No. 1948/208) Reg. 6 (a) and First Schedule—Heavy Motor-vehicle Regulations, 1950 (Serial No. 1950/26) Regs. 1 (7) (a), 11 (2).*

The defendant owned and used a trailer, approximately 25 ft. long overall, with a deck of 15 ft. by 18 ft. Its sole purpose was to carry an excavator. It was drawn by an unladen heavy motor-vehicle. It weighed a little over 3 tons empty, and had three axles with eight wheels on the two back axles, and four wheels on the front axle. With its load, it weighed 10 tons 17 cwt., the total weight of both vehicles being 14 tons 3 cwt. Heavy motor-vehicle licence fees, appropriate to Class K vehicles, had been paid in respect of the motor-vehicle, but none had been paid in respect of the trailer.

On information charging the defendant with operating a heavy motor-vehicle carrying a greater load than it was licensed to carry, in that he had not paid the licensing fee for a Class Q vehicle, that being the appropriate class under Reg. 1 (7) of the Heavy Motor-vehicle Regulations, 1950, if the motor-vehicle and trailer had been treated as one vehicle,

*Held*, 1. That Reg. 1 (7) (b) of the Heavy Motor-vehicle Regulations, 1950, means that a tractor with a single trailer attached to it is to be taken to form one heavy motor-vehicle if such trailer be liable for an annual licence fee.

2. That the defendant's trailer, designed as a trailer to carry an excavator from job to job, is exempted from payment of the annual licence fee under Reg. 1 (7) by Reg. 6 (a) and the First Schedule of the Motor-vehicles (Licensing Fees Exemption) Regulations, 1948, in conjunction with s. 21 (1) of the Transport Act, 1949; and it does not lose its identity as soon as it becomes attached to a heavy motor-vehicle, and does not thereby lose the exemption.

INFORMATION charging the defendant with operating a heavy motor-vehicle carrying a greater load than it was licensed to carry, in breach of Reg. 11 (2) of the Heavy Motor-vehicle Regulations, 1950.

The defendant was the owner of a trailer, which was built to his own design for the sole purpose of carrying a machine which the parties agreed was an excavator.

Since March 1, 1951, the defendant had used the trailer twice only—once to transport his machine to Wellington, and once to return it to Lower Hutt. The only other time when the machine was on the road was on the day when it was lent to the Comet Construction Co., Ltd., when the informant's Inspector stopped and weighed the tractor, trailer, and load.

The trailer was approximately 25 ft. long over all, with a deck of 15 ft. by 18 ft. It was built low, with no springs, and its purpose was solely to transport the excavator. It weighed a little over 3 tons empty, and had three axles with eight wheels on the two back axles, and four wheels on the front axle. It was registered under the Transport Act, 1949, as No. R. 48730, and no E plates were applied for. Both counsel agreed that there was no point in the absence of E plates.

On the day in question, the trailer had the excavator loaded on it, and was drawn by an unladen heavy motor-vehicle.

After the hearing, the learned Magistrate invited counsel to consider whether the trailer was a multi-axled motor-vehicle within the meaning of s. 2 of the Transport Act, 1949. He received their submissions on June 11, but did not consider that the matter was materially affected by this consideration.

On being weighed, the heavy motor-vehicle (which was itself unladen) weighed 3 tons 6 cwt., and the trailer and its load weighed 10 tons 17 cwt., a total of 14 tons 3 cwt.

Heavy motor-vehicle licence fees for the current quarter amounting to £9 11s., being appropriate to Class K, had been paid in respect of the heavy motor-vehicle, but none had been paid in respect of the trailer.

*F. H. Jones*, for the informant.

*R. Savage*, for the defendant.

*Cur. adv. vult.*

HESSELL, S.M. [After finding the facts, as above:] It is submitted for the informant that, under Reg. 1 (7) of the

Heavy Motor-vehicle Regulations, 1950 (Serial No. 1950/26), a quarterly fee of £18 15s. should have been paid, this being the quarterly rate for a Class Q vehicle under those Regulations, and Class Q being the appropriate class if the tractor and trailer had been treated as one vehicle on this occasion.

Regulation 1 (7) provides that, for the purpose of issuing heavy-traffic licences and assessing under the Heavy Motor-vehicle Regulations, 1950, the liability for licence fees of tractors and trailers, a tractor with a single trailer attached thereto shall be deemed to form one heavy motor-vehicle, and, under the same Regulation, a heavy motor-vehicle drawing a trailer is deemed to be a tractor.. On the face of it, therefore, once the trailer becomes attached to a heavy motor-vehicle, the combination becomes one heavy motor-vehicle, and, for the purpose of licensing under the Regulations, the weight of such (combined) heavy motor-vehicle, plus the load carried, decides the class in which such (combined) heavy motor-vehicle should be licensed under the Regulations—viz., in Class Q, with a fee of £18 15s. per quarter.

The offence under the Regulations is contained in Reg. 11 (2):

“No person shall operate any heavy motor-vehicle carrying a greater load than the maximum load it is licensed to carry.”

The preceding Reg. 11 (1), however, provides that neither the owner of any heavy motor-vehicle nor any other person shall operate any heavy motor-vehicle upon any road unless and until a heavy-traffic licence has been obtained in accordance with the Regulations, *or unless the vehicle is exempt from the liability for an annual licence fee*. It was admitted that the defendant on the day in question “operated” the trailer under the Regulations.

The only provisions for exemption from annual licence fees are those contained in Reg. 6 of the Motor-vehicles (Licensing Fees Exemption) Regulations, 1948 (Serial No. 1948/208), which provides that, pursuant to the power in para. 2 of the First Schedule to the Motor-vehicles Amendment Act, 1934-35, the following motor-vehicles shall be exempt from the payment of annual licence fees under the principal Act:

“(a) Such motor-vehicles described in the First Schedule hereto as are used on roads only in proceeding from one place to another for use in operations for which the vehicle is exclusively or principally designed . . . .”

The First Schedule provides as follows:

#### “FIRST SCHEDULE.

##### “MACHINERY.

“Any motor-vehicle or trailer designed and used on the road exclusively for driving, carrying, or propelling . . . .  
“(h) Excavators.”

“Motor-vehicle” is defined in the Transport Act, 1949, as including a trailer, and a trailer is clearly defined in the same Act, and this definition covers the vehicle in question. The

trailer is, therefore, as a trailer, clearly exempted from payment of the annual licence fee under the Heavy Motor-vehicle Regulations, 1950, Reg. 1 (7). On the other hand, the informant submits that the trailer apparently loses its identity as a trailer as soon as it is attached to a heavy motor-vehicle, and immediately loses the exemption.

If this argument be sound, the position will arise that the trailer designed to carry an excavator on the road from job to job is exempt from payment of an annual licence fee, and consequently exempt from payment of a heavy-traffic licence for so long as it is lying unused, or is not used on any road. The trailer has no motive power of its own, and, under the informant's interpretation, as soon as it becomes attached to a vehicle for the purpose of being put to the use for which it is designed, it loses its exemption and becomes one vehicle with its tractor, which combined vehicle is liable to a substantial licence fee. This, in effect, makes the trailer used for taking an excavator from one job to another subject to approximately the same licence fee as a heavy motor-vehicle. It does not appear to me that the draftsman could have meant this construction to be put on the Regulations, for the following reasons:

(i) Exemptions from annual licence fees are contemplated by s. 21 (1) of the Transport Act, 1949, which act, while repealing the provisions of (*inter alia*) the Motor-vehicles Amendment Act, 1934-35, provides for exemptions similar to those contained in the repealed Act.

(ii) These exemptions from annual licence fees under the Act are referred to in Reg. 11 (1) of the Heavy Motor-vehicle Regulations, 1950, as follows:

"Neither the owner of any heavy motor-vehicle nor any other person shall operate any heavy motor-vehicle . . .  
"unless and until a heavy-traffic licence has been obtained  
". . . or unless the vehicle is exempt from the liability  
"for an annual licence fee."

(iii) Regulation 1 (7) of the Heavy Motor-vehicle Regulations, 1950, is in general terms, whereas the exemptions in the First Schedule of the Motor-vehicles (Licensing Fees Exemption) Regulations, 1948, deal with specific vehicles, and it would seem that the doctrine *Generalia specialibus non derogant* should apply, and, as is said in *Maxwell on the Interpretation of Statutes*, 9th Ed. 183 (quoting the words of Lord Selborne, L.C., in *Seward v. The Vera Cruz* ((1884) 10 App. Cas. 59, 68)):

"where general words in a later Act are capable of reasonable  
"and sensible application without extending them to subjects  
"specially dealt with by earlier legislation . . . that  
"earlier and special legislation is not to be held indirectly  
"repealed, altered or derogated from merely by force of such  
"general words, without any indication of a particular  
"intention to do so."

(iv) The Motor-vehicles (Licensing Fees Exemption) Regulations, 1948, are not expressly repealed or amended, but are in full force and effect. No express limitation is made in the Transport Act, 1949, or the Heavy Motor-vehicle Regulations, 1950, of the exemptions granted by the Motor-vehicles (Licensing Fees Exemption) Regulations, 1948. In my opinion, the



general words in Reg. 1 (7) of the Heavy Motor-vehicle Regulations, 1950, do not repeal the exemptions granted by the Motor-vehicles (Licensing Fees Exemption) Regulations, 1948, nor should they be read to render the provisions of such Regulations valueless.

(v) The position before the Motor-vehicles Amendment Act, 1934-35, and the Heavy Motor-vehicle Regulations, 1940, were repealed, was that, if a vehicle were exempted from payment of an annual licence fee under s. 4 of the Motor-vehicles Amendment Act, 1934-35, it was, under Reg. 9 (1) of the Heavy Motor-vehicle Regulations, 1940, exempted from payment of a heavy-traffic licence fee. The language of Reg. 9 (1) above is repeated in Reg. 11 (1) of the Heavy Motor-vehicle Regulations, 1950, which Regulation, dealing with the matter of the exemption of specific vehicles from payment of licence fees for heavy motor-vehicles, is later in time than the general words of Reg. 1 (7) of the same Regulations.

(vi) Regulation 1 (7) (b) of the Heavy Motor-vehicle Regulations, 1950, should, in my opinion, be read as if it said: "A tractor with a single trailer attached thereto shall be taken "to form one heavy vehicle if such trailer be liable for annual "licence fee." If this be done, it provides a reasonable and sensible application of the two apparently conflicting Regulations. If the draftsman had meant to repeal the exemptions in the Motor-vehicles (Licensing Fees Exemption) Regulations, 1948, or any of them, he could very easily have done so in express words. He has not done so, and has not only left the Regulations unrepealed, but has recognized them and the exemptions created by them in s. 21 (1) of the Transport Act, 1949. To do what the informant asks would be to render the existing exemptions completely valueless, and it is my opinion that this was not intended.

The information is therefore dismissed.

*Information dismissed.*

Solicitor for the informant: *City Solicitor* (Wellington).

Solicitors for the defendant: *Leicester, Rainey, and McCarthy* (Wellington).

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"ascertained on precisely the same footing" (*ibid.*, 371). The opinions of others of their Lordships contain similar statements.

In *Wringe v. Cohen* ([1939] 4 All E.R. 241), the landlord of certain premises was liable to keep them in repair. A wall of those premises, which appears to have been in bad repair for some time, collapsed and damaged an adjoining shop. There was evidence that the premises had become a "nuisance" (in the popular sense of that term), but not that the landlord was aware of that fact. *Atkinson, J.*, in delivering the judgment of the Court of Appeal, said: "if the nuisance is created, not "by want of repair, but, for example, by the act of a trespasser, "or by a secret and unobservable operation of nature, such as "a subsidence under or near the foundations of the premises, "neither an occupier nor an owner responsible for repair is "answerable, unless with knowledge or means of knowledge he "allows the danger to continue. In such a case, he has in no "sense caused the nuisance by any act or breach of duty" (*ibid.*, 243). And the judgment of the Court concludes as follows: "On the other hand, if premises become dangerous, "not by the occupier's act, nor neglect of duty, but as the "result of the act of a third party, or of a latent defect, the "occupier is not liable without proof of knowledge or means "of knowledge and failure to abate it" (*ibid.*, 254).

Cases following the doctrine of *Rylands v. Fletcher* ((1868) L.R. 3 H.L. 330) are thus no doubt distinguishable from ordinary cases of nuisance, for the reason, amongst others, that, in the latter, proof that the defect giving rise to the nuisance was a latent one is a sufficient defence. The defect must be latent not only in the sense that it is not apparent but also in the sense that it was not known to the occupier or owner (as the case may be).

An illustration of a secret and unobservable operation which caused a nuisance is afforded by *Lambert v. Lowestoft Corporation* ([1901] 1 K.B. 590), where a sewer under the highway collapsed, causing the crown of the road to give way and injure a horse passing along the highway. It was found that there was no negligence in the construction or maintenance of the sewer, but that the collapse was due to one of the joints of the sewer being worked away by rats. In an action based on nuisance, it was held that the authority responsible for the maintenance of the sewer was not liable, as there was nothing to warn it of the defect in the sewer, and it could not have discovered the hole under the road by the exercise of reasonable care. True it is that there appears to have been no "nuisance "clause" in any authorizing legislation, but, even if there had been, it would have made no difference, because the condition of things did not amount to a nuisance in law. In *Irvine and Co., Ltd., v. Dunedin City Corporation* ([1939] N.Z.L.R. 741), it was made perfectly clear that it was quite open to the defendant, in spite of the existence of s. 173 of the Municipal Corporations Act, 1933, to have raised various grounds of defence to the action there based on nuisance; but, on the facts, none could be suggested.

In the present case, it must be established on proved or admitted facts that the condition of things amounted to a

nuisance. If that be done, I agree that liability would exist quite apart from negligence. But all that can be taken as proved is that water escaped from the main under the road, causing an undoubted defect or hazard on the road. There is nothing whatever to show what caused it to escape from the main. It may have been due to some such reason as appeared in *Lambert v. Lowestoft Corporation* ([1901] 1 K.B. 590), or to a slight earthquake breaking joints in the main—as to which, compare the unreported case referred to by *Sir Michael Myers, C.J.*, in the concluding paragraph of his judgment in *Irvine and Co., Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741, 767, l. 31)—or to some latent defect. On the short statement of agreed facts, it cannot be inferred that there has been a neglect of duty or failure to repair on the part of the defendant, and it is conceded that the rule in *Rylands v. Fletcher* ((1868) L.R. 3 H.L. 330) does not apply. The liability for nuisance is not, at least in modern law, a strict or absolute liability: *Sedleigh-Denfield v. O'Callagan* ([1940] 3 All E.R. 349) per *Lord Wright (ibid., 365)*. It may well be that, if further facts were proved, liability even in nuisance could be established; but, for the purposes of this judgment, I must adhere to the statement of facts agreed upon. Had the water been allowed to continue to spill over the road for a lengthy period and nothing been done about it, perhaps the defendant, with means of knowledge, would have been liable for failure to abate a continuing nuisance; but this point does not arise for consideration, and I express no view on it.

I therefore propose to adjourn the whole case *sine die*, to enable counsel for plaintiff to consider what course of action he should now adopt. If necessary, both counsel may see me in Chambers to discuss the matter.

*Hearing of action adjourned.*

Solicitors for the plaintiff: *Adams Bros.* (Dunedin).

Solicitors for the defendant: *Ramsay, Haggitt, and Robertson* (Dunedin).

## POLICE v. VALENTINE.

1952. January 23, February 6, before Mr. H. JENNER WILY, S.M., at Auckland.

*Transport—Offences—Parking Vehicle within Twenty Feet before Authorized Pedestrian Crossing—"Parking"—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 4 (7) (c)—Traffic Regulations, 1936, Amendment No. 8 (Serial No. 1950/189), Reg. 2 (2)—Traffic Sign Regulations, 1937 (Serial No. 1937/159), Reg. 1 (3).*

When a person is charged under Reg. 4 (7) (c) of the Traffic Regulations, 1936, with parking his taxi-cab within 20 ft. before the nearer side of an authorized pedestrian crossing, the word "parking" bears the defined meaning given to it by Reg. 1 (3) of the Traffic Sign Regulations, 1937 (which must be read with the first-named Regulations); and the proved facts must comply with that defini-

tion before such person can be convicted of the offence in relation to parking.

*O'Brien v. Walker* ((1946) 4 M.C.D. 594) applied.

INFORMATION charging the defendant that, being the person in charge of a taxi-cab on Khyber Pass Road, he did park such vehicle within 20 ft. before the nearer side of an authorized pedestrian crossing, contrary to Reg. 4 (7) (c) of the Traffic Regulations, 1936.

*C. P. Richmond*, for the defendant.

*Cur. adv. vult.*

WILY, S.M. From the evidence, it was clear that defendant stopped his taxi-cab some 3 ft. to 4 ft. before the nearer side of an authorized pedestrian crossing on Khyber Pass Road. He stopped for the purpose of setting down a passenger, during the course of which he had to give the passenger change from a £1 note he had tendered as his fare. He was stopped for this purpose in all some three to four minutes. Counsel for the defence submits that such stopping does not constitute the offence of "parking" with which the defendant is charged.

No definition of "parking" appears to be given in the Traffic Regulations, 1936, but, in Reg. 1 (3) of the Traffic Sign Regulations, 1937, "parking" is defined, *inter alia*, as not including "the standing of a motor-vehicle as foresaid for any period not exceeding five minutes," and as not including the "standing of a motor-vehicle actually engaged in taking up or "setting down persons or goods."

It has been held in *O'Brien v. Walker* ((1946) 4 M.C.D. 594) that the Traffic Regulations, 1936, must be read together with the Traffic Sign Regulations, 1937, and I respectfully agree with the decision of the learned Magistrate in that case. Regulation 4 (1) (c) (as amended), under which this defendant is charged, provides as follows:

"(7) No person or driver in charge of any vehicle not  
"being a bicycle shall stop, stand, or park such vehicle  
"whether attended or unattended in any of the following  
"places or positions . . .

"(c) . . . within 20 ft. before the nearer side  
"of an authorized pedestrian crossing."

The words "stop, stand, or park" referred to would appear to create and prohibit different types of offences, and, as the word "park" has the defined meaning given to it in Reg. 1 (3) of the Traffic Sign Regulations, 1937, it is necessary that the proved facts should comply with that definition before the defendant can be convicted of the offence in relation to parking. The facts as proved show clearly that the defendant did not "park" within the meaning of that definition, and the prosecution must be dismissed. As the facts were fully within the knowledge of the prosecution before the information was laid, I will not grant an amendment of the information to allege "stopping" or "standing," which the defendant certainly did do.

*Information dismissed.*

Solicitors for the defendant: *Buddle, Richmond, and Co.*  
(Auckland).

## PATTON AND ANOTHER v. MINISTER OF LANDS.

1951. September 4, 5, 6, October 25. Land Subdivision in Counties Appeal Board, Auckland. Mr. M. C. ASTLEY, S.M., Chairman, and Messrs. R. P. Worley and G. M. Ross Jackson. Members.

*Land Subdivision in Counties—Town-planning—Scheme Plan of Subdivision into Building Sections—Minister's Refusal to approve Such Plan on Ground of "public interest"—Such Refusal based on Proposed Town-planning Outline Development Plan—Such Plan only in Preliminary or Exploratory Stages, and not "an approved town-planning or extra-urban planning scheme"—Refusal invalid accordingly—Board of Appeal—Conflict of Jurisdiction with that of Town-planning Board raised by Evidence in Support of Minister's Refusal—Land Subdivision in Counties Act, 1946, ss. 3 (5) (a), 4, 7—Town-planning Act, 1926, ss. 16, 19, 29.*

The Minister of Lands refused his approval of a scheme plan of the subdivision of an area of 29a. 2r. 21pp. in the Manukau County into ninety-five building sections. The Minister based his refusal on the ground of "public interest" under s. 3 (5) (a) of the Land Subdivision in Counties Act, 1946, on the basis of a proposed Outline Development Plan for the Auckland Metropolitan District and its environs, whereby a scheme of urban and extra-urban planning under the Town-planning Act, 1926, was in course of preparation by the responsible local authorities, including the Manukau County. To carry out that planning scheme, which was in its preliminary or exploratory stages, there was proposed a "green belt," in which area no subdivision of land into allotments of less than 5 acres would be permitted. (The land here under notice was in the proposed "green belt" of the Manukau County.)

On appeal under s. 7 of the Land Subdivision in Counties Act, 1946, against the refusal of the Minister's approval,

*Held*, 1. That "an approved town-planning or extra-urban planning scheme" within s. 4 of the Land Subdivision in Counties Act, 1946, means a scheme approved in accordance with the provisions of s. 21 of the Town-planning Act, 1926.

2. That the Outline Development Plan which formed the ground of the Minister's refusal comprised several urban and extra-urban planning schemes, none of which had reached the stage, under the Town-planning Act, 1926, of submission to the Town-planning Board; and they had not been even provisionally approved.

3. That, accordingly, the Outline Development Plan could not be raised by the Minister as a matter of "public interest" under s. 3 (5) (a) of the Land Subdivision in Counties Act, 1946, as a ground for refusal to consent to a subdivision.

Evidence was called which showed that there was an unsatisfied demand for residential sections in and around Auckland, that the appellant's subdivision was situated about half a mile beyond an existing residential subdivision and about one mile from the township of Panmure, and that there was a substantial and continuing growth of industry around this township.

The Minister's case did not raise factual objection to the subdivision of itself, but was devoted to evidence in support of the merits of the Outline Development Plan, which was substantially the same evidence as would be adduced upon the hearing, under s. 19 of the Town-planning Act, 1926, by the Town-planning Board of objections to the provisional approval of a town-planning scheme.

*Held also,* 1. That, although the Town-planning Board is partly judicial in character, and is required by s. 20 of the Town-planning Act, 1926, to make final decisions, the Board of Appeal under the Land Subdivision in Counties Act, 1946, was, on the facts, asked to determine a matter which was under the jurisdiction of the Town-planning Board, and that, of itself, would be an objection to the determination of the present appeal; and such a determination would be a denial to the subject of a consideration of the preliminaries prescribed by the Town-planning Act, 1926, which afford him an opportunity to study, and, if he wishes, to object to, a planning scheme, and the present appellant had had neither of those rights.

2. That a refusal to approve a subdivision under the Land Subdivision in Counties Act, 1946, upon the grounds taken by the Minister might be a bar to, or at least might indefinitely postpone, the right of compensation for injurious affection created by s. 29 of the Town-planning Act, 1926.

3. That the foregoing findings, when considered in conjunction with s. 4 of the Land Subdivision in Counties Act, 1946, provided a good reason for the requirement in that section that the Minister could refuse to approve a subdivision only when the town-planning scheme had reached the stage of approval under the Town-planning Act, 1926.

The appeal was accordingly allowed.

APPEAL under s. 3 (7) of the Land Subdivision in Counties Act, 1946, against the refusal of the Minister of Lands to approve a scheme plan of subdivision of land under that Act. The land comprised in the plan was 29 acres 2 roods 21.3 perches, being part of Allotment 24 of the Parish of Pakuranga and being all the land in Certificate of Title Vol. 618 Folio 163 (Auckland Registry), and was situated upon the south boundary of the main Auckland-Howick highway, distant about one mile from the Tamaki Bridge. The scheme plan showed a subdivision of ninety-five sections of an average size of slightly less than a quarter of an acre each with appropriate reserve

and roading, with a frontage to the main highway of approximately 11 chains.

The scheme plan was submitted to the Minister on November 12, 1950. By letter of May 30, 1951, to the appellants' surveyor, the Minister refused to approve of the subdivision. The material portion of that letter is as follows:

"I have now been advised by the Surveyor-General that the plan has been discussed with the Minister in the light of the Council's extra-urban planning scheme. As the overall Metropolitan zoning scheme, prepared in collaboration with the County Council has been submitted to the Town-planning Board, and as the Council is in full agreement with the zoning as laid down in the Metropolitan Outline development plan, and is preparing an extra-urban plan in accordance therewith for submission to the Town-planning Board, the Minister has refused to approve Scheme Plan 4302.

"Refusal to approve is made under s. 3 (5) (a) of the Act—i.e., 'public interest'—based on the zoning proposals of the Manukau County Council."

*Wheaton*, for the appellants.

*Speight*, for the respondent.

*Cur. adv. vult.*

The judgment of the Board of Appeal was delivered by

ASTLEY, S.M. (Chairman). Before the hearing of evidence commenced, Mr. *Wheaton*, for the appellant, submitted that, whatever the Minister had said in his letter, he had chosen to assert his refusal under s. 3 (5) (a) of the Land Subdivision in Counties Act, 1946, and that the inquiry should be restricted to that paragraph. Subsection 5 of s. 3 is as follows:

"Without prejudice to the generality of the last preceding subsection, the Minister may refuse to approve any scheme plan—

"(a) If in his opinion closer subdivision or settlement of the land shown on the scheme plan is not in the public interest or the land for any other reason whatsoever is not suitable for subdivision:

"(b) If in his opinion adequate provision has not been made for the drainage of any allotment or the disposal of sewage therefrom:

"(c) If the subdivision would in his opinion interfere with or render more difficult or costly the carrying-out of any public work or scheme of development which is proposed or contemplated by the Minister of Works or any other Minister of the Crown or by any local authority:

"(d) If in his opinion the proposed subdivision does not conform to recognized principles of town-planning."

Mr. *Wheaton* further submitted that, as the provisions of this statute generally, and in particular those of s. 3 thereof,

detracted from the rights of ownership in land, such provisions must be strictly construed, and that the Minister's refusal (on the ground that the subdivision conflicted with a zoning or extra-urban planning scheme under the Town-planning Act, 1926, proposed by the Manukau County Council) could be founded upon para. (c) or para. (d) of s. 3 (5) and should therefore not be deemed to be within the meaning of "public interest" in para. (a).

Mr. Speight, in reply, claimed that para. (c) or para. (d) did not include a refusal based upon a planning scheme under the Town-planning Act, 1926, or, alternatively, that, if one of those paragraphs did, then the appellant's objection upon this ground should be met by the Board of Appeal amending the grounds of the Minister's refusal.

As to this last point, this Board is of the opinion that no amendment of the grounds of appeal should be allowed. Section 3 of the Land Subdivision in Counties Act, 1946, sets out the procedure to be followed in submitting subdivisional plans for allotments in excess of 10 acres, the grounds upon which the Minister may refuse his consent to such plans, and the constitution and jurisdiction of the Board of Appeal. The Regulations under the Act do no more than authorize the Board, by Reg. 19 (11), to regulate its own procedure. Amendment, however, is not a matter of procedure, and the long-standing principle of any appeal is that it should be directed towards the finding already made (in this case, by the Minister), and that fresh ground should not be introduced.

The Board, however, is of the opinion that a refusal based upon a town-planning or extra-urban planning scheme does not necessarily come under the provisions of either para. (c) or para. (d). Under para. (c), the Minister may refuse consent to the proposed subdivision if it would "interfere with . . . the carrying-out of any public work or scheme of development which is proposed or contemplated . . . by any local authority." It appears that the word "carrying-out" tends to make the following words in the paragraph ("public work" or "scheme of development") *ejusdem generis*, implying the physical execution of works or schemes. An extra-urban planning scheme under the Town-planning Act, 1926, is not in this category. In paragraph (d) "the proposed subdivision does not conform to recognized principles of town-planning," would appear to relate to the internal formation and lay-out of the subdivision. The Board, therefore, finds that there is no objection on those grounds to the Minister's stating his refusal to approve the plan on the ground that "the scheme plan is not in the public interest" under para. (a). To this ground the Minister has specifically attached his refusal, and this becomes the sole issue for consideration by the Board. Mr. Speight made this plain in his opening address, and went further in saying that the remaining ground of refusal under para. (b) (that "adequate provision has not been made for . . . drainage . . . or the disposal of sewage") was not raised by the Minister nor would be raised in the hearing of this appeal.



The matter which the Minister has considered and made the basis in refusing his consent upon the grounds of "public interest" is a proposed Outline Development Plan for the Auckland Metropolitan District and its environs, whereby schemes of urban and extra-urban planning under the Town-planning Act, 1926, are in course of preparation by the responsible local authorities. The essential physical features are shown upon a plan produced at the hearing, which, together with the evidence adduced, showed proposals to constitute:

1. A main urban area generally comprising the present City and suburbs, including existing adjacent subdivisions such as Laingholm and the East Coast and Eastern Beach settlements, and the boroughs of Henderson, Otahuhu, and Papatoetoe, the whole to be a main urban area, and shown white in colour on the plan.

2. An extra-urban area or fence known as a "green belt" surrounding the urban area comprising a rural zone some miles in width. This rural zone includes the balance of Waitemata County upon the northern and western perimeter and the balance of Manukau County upon the eastern and southern perimeter of the urban area (excluding those portions of each County already in the urban area).

3. Outer urban units of varying size and function beyond the green belt.

The intention of the whole scheme based on the Outline Plan is to confine future urban subdivision, and consequential increases of population, into the main urban area upon the basis of an estimated population of 600,000 by the year 2,000, so as to obtain a concentration of population sufficient to support the successful creation and functioning of the public amenities of transport, water and electricity supplies, roads, sewerage, and the like in this area. It is considered by those responsible for the plan that all this increased population will be able to acquire residential sites within the white area during the period mentioned.

To carry out this intention, there is proposed the "green belt" mentioned above, which area it is intended shall supply certain rural amenities, and in which area no subdivision of land into allotments of less than 5 acres will be permitted.

The land the subject of this appeal is in the green belt of the Manukau County.

The whole of the Outline Development Plan is in the preliminary and exploratory stages. It may be said that the Auckland Metropolitan Planning Organization, which is responsible for the overall planning of the main urban area, has its proposals well advanced, and, as stated by Mr. F. W. O. Jones, the Planning Officer, the implementation of the plan is dependent now upon the preparation and completion of the extra-urban scheme, including the "green belt," by, in this case, the Manukau County Council. It was at the instigation of this organization that the Minister of Lands was asked for his co-operation in controlling subdivisions in the Manukau County in conformity

with the Outline Plan in the interim period before extra-urban plans were finally approved.

In the case of the land the subject of this appeal, the Minister, upon being informed that the subdivision did not conform with the Outline Plan, has refused his consent to it, and the issue now before this Board of Appeal is whether the Minister on the grounds of "public interest" was right in so refusing his consent.

This Board of Appeal is a judicial body with the jurisdiction given to it by the Land Subdivision in Counties Act, 1946, and, as such, must observe and apply principles of the law in its interpretation of, and decision upon, the issue before it.

The land the subject of this appeal—and, indeed, speaking generally, all the land in the Outline Plan—is privately owned, and it is here appropriate to state the law as to the interpretation of statutes affecting private property so far as it is relevant to this inquiry, and that is, briefly, that statutes which detract from rights of ownership or which take away an interest in the property of a subject are to be construed strictly, and that such an intention is not to be imputed to the Legislature unless expressed in unequivocal terms. This principle has been reiterated so often in our Courts that no authority need be quoted in its support.

With that old-established principle in mind, it is then necessary, in amplification of the issue set out above, to decide whether the grounds of the Minister's decision should be included in the phrase "public interest"—in other words, that the appellant's subdivision, being not in conformity with the Outline Plan (a proposed scheme under the Town-planning Act, 1926), should, in the public interest, be refused under the Land Subdivision in Counties Act, 1946. The principle of law here applicable, and many times reiterated in judicial decision, is conveniently stated in *Hardy v. Fothergill* ((1888) 13 App. Cas. 351), where *Lord Selborne* said: "It is not . . . for . . . any . . . Court to decide such a question as this under 'the influence of considerations of [public] policy, except so far as that policy may be apparent from, or at least consistent with, the language of the Legislature in the statute or statutes upon which the question depends'" (*ibid.*, 358). Where the statutes govern the matter in question, the Courts will not go beyond them in interpretation of public policy or public interest, for, as was said in *Egerton v. Earl Brownlow* ((1853) 4 H.L. Cas. 1, 123; 10 E.R. 359, 409): "To allow this 'to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province . . . of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the Judge to expound the law only; the written from the statutes . . . and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community'" (*ibid.*, 123; 409). It was said

by Lord Halsbury, L.C., in *Janson v. Driefontein Consolidated Mines, Ltd.* ([1902] A.C. 484), in referring to a contract which was alleged to be against public policy: "I do not think that 'the phrase 'against public policy' is one which in a Court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy . . . you may say that it is because they [certain things] are contrary to public policy they are unlawful; but it is because these things have been . . . enacted or assumed to be by the common law unlawful, and not because a Judge or Court have a right to declare that such and such things are in his or their view contrary to public policy" (*ibid.*, 491, 492).

As already noted, the Outline Development Plan comprises proposed urban and extra-urban planning schemes under the Town-planning Act, 1926, which, as stated in its Long Title, is "An Act to provide for the Making and Enforcement of Town and Extra-urban Planning Schemes." Under this statute, it is provided that local authorities shall prepare town-planning and extra-urban planning schemes. Every scheme shall, after preparation, be submitted (s. 16) to the Governor-General in Council, and, after having been provisionally approved, shall then be submitted to the Town-planning Board. This Board may then *provisionally* approve of the scheme (s. 17), upon which the local authority shall publicly notify the scheme and deposit plans and maps for public inspection. Every ratepayer has, for the ensuing three months, a right of objection to the scheme. Thereafter, the local authority shall transmit the objections to the Town-planning Board (s. 18), who shall consider the same and may, if it thinks fit, appoint a committee to hear the objections, at which hearings evidence may be given on oath and parties may be represented by counsel (s. 19). The Board may uphold or reject any objection or modify the scheme, and the determination of the Board shall be final (s. 20). By s. 21, the Town-planning Board shall then finally approve the scheme, and shall signify its approval by affixing thereto its seal. Provision is then made for claims for compensation by persons injuriously affected by a scheme to be dealt with in the manner provided by the Public Works Act, 1908, and for the creation of funds from which claims may be paid.

Specific provision is made by s. 34 of the Act for a local authority in some cases to prohibit the erection of buildings or the carrying-out of work before a scheme has been approved under s. 21.

Turning now to the Land Subdivision in Counties Act, 1946, under which subdivisions of land (into sections of less than 10 acres) outside a borough or town district have to be submitted to the Minister of Lands for his consent, s. 4 provides:

"Notwithstanding anything in this Act . . . where there is an approved town-planning or extra-urban planning scheme under the Town-planning Act, 1926, affecting any locality, no scheme plan of land in that locality shall be approved or varied under this Act . . . if the scheme

"plan . . . [is] inconsistent with the approved town-planning or extra-urban planning scheme."

The words "an approved town-planning or extra-urban planning scheme" clearly mean such a scheme approved in accordance with the provisions of s. 21 of the Town-planning Act, 1926. Section 4 does not even refer to *provisionally* approved plans under s. 17 of the Town-planning Act, 1926.

The Legislature has made it plain from the statutory provisions so quoted what its intention was with regard to land affected by town-planning schemes. Having set out the method for the preparation and provisional approval of the schemes, it has then provided for public objection and the hearing of such objections, followed by the final approval of the Town-planning Board. When such final approval is given by the Board, then and not until then, the Minister of Lands is required by s. 4 of the Land Subdivision in Counties Act, 1946, to refuse his consent to a subdivision which is inconsistent with the approved scheme. Section 4 in itself is a complete code of those matters to which the Minister is bound to have regard so far as the Town-planning Act, 1926, is concerned, and the section makes it clear that any question of a clash between a scheme plan under the Land Subdivision in Counties Act, 1946, and a town-planning or extra-urban planning scheme before such has been finally, or even perhaps provisionally, approved, has been resolved by the Legislature. Parliament is presumed to know the law and the effect of any new legislation upon existing legislation. This presumption is even stronger in this case, as, although such a clear definition of rights in respect of pending town-planning schemes not even yet provisionally approved is provided by s. 34 of the Town-planning Act, 1926, yet, in enacting the Land Subdivision in Counties Act, 1946, the Legislature saw fit to enact, so far as town-planning is concerned, s. 4, which speaks only of an "approved" plan under the earlier statute.

The Outline Development Plan which formed the ground of the Minister's refusal comprises several urban and extra-urban planning schemes, none of which has yet reached the stage of s. 16 of the Town-planning Act, 1926—that is, submission to the Governor-General in Council—and they have not yet been even provisionally approved.

Upon these facts, and applying the principles already set forth, the Board of Appeal finds that the Outline Development Plan cannot be raised by the Minister as a matter of "public interest" under s. 3 (5) (a) of the Land Subdivision in Counties Act, 1946, for refusal to consent to a subdivision. Whatever else may be included in those words, they cannot apply to a proposed scheme under the Town-planning Act, 1926.

The issue so far resolved was raised before the hearing of evidence on the appeal, and was reserved for decision while the hearing proceeded. Evidence was called which showed that there is an unsatisfied demand for residential sections in and around Auckland, that the appellant's subdivision was situated about half a mile beyond an existing residential subdivision

and about a mile from the township of Panmure, and that there was a substantial and continuing growth of industry around this township.

The Minister's case did not raise factual objection to the subdivision of itself, but was devoted to evidence to support the merits of the Outline Development Plan, the same evidence which doubtless would be adduced upon the hearing of objections by the Town-planning Board under s. 19 of the Town-planning Act, 1926. On this point, it is to be noted that that Board is partly judicial in character, and, under the Act, is required to make final decisions. In the result, therefore, this Board of Appeal was on the facts asked to determine a matter which is under the jurisdiction of the Town-planning Board, and this of itself would be an objection to the present hearing.

Not only is there thus a clash of jurisdictions, but there is also a denial to the subject of a consideration of the preliminaries prescribed by the Town-planning Act, 1926, which afford him an opportunity to study, and, if he wishes, to object to, a planning scheme, neither of which rights has this appellant had. Furthermore, a refusal of a subdivision under the Land Subdivision in Counties Act, 1946, upon the grounds taken by the Minister might be a bar to, or might at least indefinitely postpone, the right of compensation for injurious affection created by s. 29 of the Town-planning Act, 1926. No such intentions as these can be spelled out of any part of the relevant legislation, and of themselves these factors constitute serious objections to the Minister's case on this appeal. They also, when considered in conjunction with s. 4 of the Land Subdivision in Counties Act, 1946, appear to provide a good reason for that section's requiring the Minister's refusal to a subdivision only when the town-planning schemes have reached the stage of approval under the Town-planning Act, 1926.

The Board of Appeal will therefore allow the appeal with costs to the appellant. Before making the order, however, there is the outstanding matter of the requirements of the Chief Surveyor *re* roads, &c., contained in his letter of May 30, 1951, which requires attention. It is understood that the parties can agree on this detail, and, if so, such should now be done, whereupon final decision on the above terms in this appeal will be given. The appellant will be allowed solicitors' costs £43 1s. (being £6 6s. preparation for inquiry, £15 15s first day, and two days at £10 10s., in accordance with the Instructions for Members of Commissions of Inquiry, dated February 9, 1925) and witnesses' expenses £3 14s. (being Mr. Harrison qualifying, &c., £3 3s. (Mr. Murray £3 3s.) and Messrs. Bennett and Webb £1 4s each).

*Appeal allowed.*

Solicitors for the appellants: *Bamford, Brown, and Wheaton* (Auckland).

Solicitor for the respondent: *Crown Solicitor* (Auckland).

BLACKWATER MINES, LIMITED v.  
VALUER-GENERAL.

1951. May 30. Nelson Land Valuation Committee. Mr. H. J. THOMPSON, S.M., Chairman, at Reefton.

*Valuation of Land—Residences owned by Mining Company in Remote Mining Township and let to Its Employees—Company Only Possible Purchaser of Other Residences, and Market Prices accordingly Low—Objections by Company to Valuations of Residences—Prices paid on Monopoly Market—Uncertainty of Company's Future Prospects—Valuations on Existing Basis alone Possible—Onus of showing Valuations Wrong not discharged—Valuation of Land Act, 1925, s. 27.*

The township of Waiuta was situated at the end of a twenty-four-miles road from Reefton, and the whole township depended entirely on the life and working of the Blackwater Mines, which dealt with the recovery of gold by means of quartz-crushing methods. There were no other industries or farms anywhere near Waiuta, and no inducement for anyone other than the mine employees to live there. Some fourteen houses were erected on land comprised in the company's mineral licence, and some forty-one houses on residence sites owned by the company. In addition, there were some seventy-eight houses on residence sites privately owned.

Apart from several sales of the privately-owned houses by one employee to another, the only possible purchaser was the company, and, when it bought, the price it paid was very much lower than the valuations made by the Valuation Department. The houses for sale to the company comprised those of employees who wished to leave to go elsewhere and those forming part of deceased person's estates which had to be sold in order to wind up the estates. One house, for example, valued at £630, was bought in November, 1950, for £320, and another, valued at £165, was bought for £80.

On objection by the company to the increased valuations of the residences (apart from the sites),

*Held*, 1. That the residences could not be regarded as a wasting asset, tied to the mine, and their life could not be calculated accordingly; but, as it was necessary for the company to have the houses to attract workmen, and as they were being used as homes by the workmen, the residences must be considered on that basis.

2. That it was impossible to anticipate the company's future prospects, so that consideration of the position on the existing basis was the only possible course for the Valuation Department to pursue; and, in any event, as new valuations must be made every five years, any alteration in the company's position could be dealt with as it arose.

3. That, with reference to the influence on market prices of the locality and the purpose of the township, the company held a monopoly of the buying market, and was, in effect, able to dictate the price to desperate sellers who had to take a low price to quit; and, accordingly, the prices paid on a monopoly market were no answer to the valuations.

4. That the company had not discharged the onus imposed on it by s. 27 of the Valuation of Land Act, 1925, as it had failed to show that any mistake had been made by the Valuation Department or that the values were incorrect; and, accordingly, the valuations of the company's houses were upheld.

OBJECTIONS, fifty-five in number, by Blackwater Mines, Ltd., against valuations on the District Valuation Roll of Reefton of residences at the township of Waiuta.

*Steele*, for the objectors.

*Maitland*, for the Crown.

At the conclusion of the evidence, the decision of the Committee was delivered by

THOMPSON, S.M., as Chairman (orally). The Committee has been impressed by the able way in which the case has been presented for the objectors by Mr. *Steele*, and by the equally able way in which the objections raised have been answered by Mr. *Maitland*.

The circumstances for consideration are unique in the Committee's experience, and are possibly unique as far as the whole of New Zealand is concerned.

The township of Waiuta is situated at the dead end of a twenty-four-miles road from Reefton, and the whole township depends entirely on the life and working of the Blackwater Mines, which deal with the recovery of gold by means of quartz-crushing methods. There are no other industries or farms anywhere near Waiuta, and no inducement for anyone other than the mine employees to live there. Some fourteen houses have been erected on land comprised in the company's mineral licence, and some forty-one houses on residence sites owned by the company. In addition, there are some seventy-eight houses on residence sites privately owned.

The evidence shows that, apart from several sales of the privately-owned places by one employee to another, the only possible purchaser is the company, and, when it bought, the price it paid was very much lower than the Government valuations recently made by the Valuation Department and now objected to. The houses for sale to the company comprised those of employees who wished to leave and go elsewhere, and those of deceased estates, which had to sell to wind up the estate. One house, for example, valued at £630, was bought last November for £320, and another, valued at £165, was bought for £80.

The company has admitted that the increased capital valuations at the moment do not affect it, as rating is on the un-

improved value, and no objection is taken to the valuation of the sites; but the company objects to the valuation of the houses, as, if the system of rating is changed to rating on capital value, the result will be disastrous. The motive of the objection is of no importance, but it is interesting to note that the objection is based on something which may never happen. The possibility of a change in the rating system is too nebulous to be relevant.

The company's chief objections to the increased valuations are:

(a) The township is entirely dependent on the company's quartz mine, and, if the company ceases operations, the township must cease to exist, and the buildings will be worth only removal value. The life of the buildings, therefore, is tied to the life of the mine, and this should be taken into account. The company's quartz reserves are steadily declining, and the values of residences should diminish accordingly.

(b) The isolated locality of the township is such that the only possible purchaser for the dwellings is the company, and the element of competition is therefore lacking, and market prices are accordingly low. Values at Waiuta cannot be compared with prices elsewhere, and the new valuations are completely out of touch with reality and market prices.

With reference to the contention that the residences should be regarded as a wasting asset, tied to the mine, and their life calculated accordingly, the Committee is of opinion that it can not uphold the submission. The fact is that it is necessary for the company to have houses to attract workmen; these residences are being used as homes by the workmen at present, and must be considered on that basis. Nobody can foretell if, in a few years, some new process for winning gold may be discovered and may revolutionize the industry, and so indefinitely prolong the life of the mine; or if the price of gold may rise and have the same effect; or if, on the other hand, the mine may peter out in a few years. The whole future position is so indefinite that it is not possible for the Committee to make even an intelligent guess as to what will happen, and consideration of the position on the existing basis is the only possible course to pursue. In any event, as new valuations are now made each five years, any alteration can be dealt with as it arises.

With reference to the influence of the locality of Waiuta, and the purpose of the township, on market prices, the Committee has been impressed with the arguments advanced. It is clear that the market price is a comparative factor which must be taken into account when considering valuations. If the Department had not considered market prices, the valuations would need revision. The objectors have stated that at Grey-mouth recently increases in market prices were advanced successfully to justify increased valuations there. It is just as necessary to take into account decreases in prices. However, it has to be realized that the market price to be considered is that where there is a willing seller on the one side and a willing buyer on the other. Is that the position here? The answer



appears to be: "No." The company is in the unique position of holding a monopoly of the buying market, and is in effect able to dictate the price to desperate sellers, who have to take a low price to quit. The market is therefore not a free one. Probably the fairer price is that shown by the few sales among private buyers and sellers, it being significant that these approximate closely to the recent valuations by the Department. The Committee is therefore unable to agree to the proposition that the Department's valuations are too high because the company is able to buy at a much lower figure, and must decide that the prices paid on a monopoly market are no answer to the valuations.

Under s. 27 of the Valuation of Land Act, 1925, the onus of showing that the valuations are wrong is placed upon the objectors. This onus may be discharged by showing that the Valuation Department has erred, for example, in the basis of valuations adopted, in the application of legal principles, in its computations, or in failing to take into account matters affecting valuation which are normally considered. In the present case, no such errors have been disclosed. On the contrary, the evidence on behalf of the Department shows conclusively that the peculiar conditions at Waiuta and the influence of locality have been very carefully considered and have been given due weight in fixing the valuations there. For residences which are admitted to be comfortable and in reasonable order for residences, valuations range from 3s. per square foot for the smaller and older cottages to approximately 12s. for the mine manager's house.

The Committee are of opinion that such valuations can be considered very generous as far as the company is concerned, as bare sheds and garages will be worth the price of 3s., and there are residences which are actually inhabited by the workmen and bringing in rents which average from 8s. to 10s. The Committee can not be blind to the average cost and value of such houses elsewhere, and agree that a reduction in valuation to 3s. per square foot is the most generous allowance the Department can be expected to make for any such residence.

In short, therefore, it has been necessary for the objectors to prove that the Department is wrong in its valuations. No proof has been given to this effect, the chief point of criticism being that there is a great discrepancy between the prices paid for houses by the company and the valuations; but this has been answered by the conclusion that there is *not*, in fact, a free market with willing sellers.

The Committee have therefore come to the conclusion that the objectors have failed to show that any mistake has been made by the Department or that the valuations are incorrect, and the valuations must, therefore, be upheld.

All the objections are accordingly dismissed.

*Objections dismissed.*

Solicitors for the objectors:

Solicitor for the Crown: *Crown Solicitor* (Westport).

SANDERS v. BULK FERTILIZER DISTRIBUTORS,  
LIMITED.

1951. June 18, 25, August 30, before Mr. F. MCCARTHY, S.M., at Pukekohe.

*Transport—Heavy Motor-vehicles—Classification of Roads—Road on Boundary of Two Counties classified as Class III—Each County a “Controlling Authority” only up to Midline of Road—Classification invalid—“Controlling Authority”—Public Works Act, 1928, ss. 113, 115, 116, 120—Heavy Motor-vehicle Regulations, 1950 (Serial No. 1950/26), Regs. 1 (3), 4 (1), 11(1).*

The defendant was charged with operating a heavy motor-vehicle, a fertilizer distributor, while it was carrying a load of greater weight than was indicated for the road on which it was travelling, contrary to the provisions of Reg. 4 (1) of the Heavy Motor-vehicle Regulations, 1950. The road in question was part of the common boundary between the Waikato County and the Franklin County, the boundary of the former being defined as extending to the middle of that road; thus, one-half of the road from the lateral midline to the edge lay in each County.

All facts were admitted, apart from the proper classification by the Waikato County of the road as a Class III road.

*Held*, 1. That, by virtue of ss. 113, 115, and 116 of the Public Works Act, 1928, the powers of control, &c., exercisable by a County Council are confined to county roads situate in the county; and, if such roads are not physically situate in the county, the County Council has no control over them.

2. That boundary roads come within the exception contemplated by s. 116, so that, in the absence of a direction by the Governor-General under s. 120, since only half of the road in question was “situate within the County,” the Council had control of such road to the lateral midline of the road under s. 116 of the Public Works Act, 1928, and was, at most, a “controlling authority,” within the definition of that term in Reg. 1 (3) of the Heavy Motor-vehicle Regulations, 1950, to the midline of the road.

3. That, consequently, the purported classification of the road by the Waikato County Council was invalid; and the position was unaltered if the Franklin County Council had also classified the road as Class III, as, for the reasons given, it, too, was not a “controlling authority” in respect of it.

*Quaere*, Whether a vehicle, which is exempt from payment of licence fees under the Motor-vehicles (Licensing Fees Exemption) Regulations, 1948, and from payment of heavy traffic fees under Reg. 11 (1) of the Heavy Motor-vehicle Regulations, 1950, is subject to Reg. 4 (1) of the latter Regulations.

THREE INFORMATIONS lodged by the complainant in his capacity as Traffic Inspector of the Waikato County Council charging the defendant company with operating a heavy motor-vehicle—namely, its fertilizer distributor—on three separate occasions whilst the vehicle in question was carrying a load of greater weight than that indicated for the road in question in each case.

The facts sufficiently appear from the judgment.

A. M. Gould, for the defendant.

*Cur. adv. vult.*

MCCARTHY, S.M. Various points were raised by Mr. Gould at the hearing, and I granted leave both to him and to the complainant to submit legal argument in writing. I have had the assistance of two written memoranda from Mr. Gould and Inspector Sanders, and, as a result of their research and exposition of the numerous Regulations, repeals, and amendments thereto, the issues have become fairly clear cut.

Mr. Gould has withdrawn his plea of "not guilty" to the second charge, which relates to a road wholly within the county, and substituted a plea of "guilty," which leaves only the remaining charges which allege offences on the Miranda-Pokeno Road to be dealt with.

The vehicle in question is a specially constructed vehicle, fundamentally in the form of a hopper, which is used by the company to make deliveries of lime from its lime works at Miranda direct to the farms of its consumers. I understand that in some cases it is used to spread the lime over the land.

The vehicle carries "E" plates, which means it is exempt from payment of license fees under the Motor-vehicle (Licensing Fees Exemption) Regulations, 1948 (Serial No. 1948/208). Those were enacted in substitution for similar Regulations of 1937, and are saved by s. 169 of the Transport Act, 1949. Mr. Gould is no longer pressing his argument that, because this vehicle is exempt from payment of licence fees under the 1948 Regulations and heavy traffic fees under Reg. 11 (1) of the Heavy Motor-vehicle Regulations, 1950, it is not subject to Reg. 4 (1) of the latter Regulations, under which these informations are laid. I may say in passing, however, that I think it is, but, in the view which I take of the matter, I need not decide this question specifically. Further, I do not now need to decide the interesting question raised by Inspector Sanders that this particular vehicle is not entitled to the benefit of the exemption contained in the Regulations of 1948 despite the fact that "E" plates have been issued in respect of it.

It is conceded that the vehicle was operated by the company, and that its axle load was greater than that permitted on a Class III road, in which this road has been classified, and that the vehicle is subject to the provision of the Heavy Motor-vehicle Regulations, 1950, so that the only question remaining is Mr. Gould's attack on the classification of the road.

The road in question is part of the common boundary between the Waikato County and the Franklin County. The

boundary of the Waikato County in this area is defined in 1949 *New Zealand Gazette*, 2501, as extending to the middle of this road. This means that one half of the road from the lateral midline to the edge lies in the Waikato County and the other half in the Franklin County.

Mr. *Gould* admits that the Waikato County Council has given proper notices under Reg. 3 of The Heavy Motor-vehicle Regulations, 1950, and done all acts and things in proper fashion so far as it is concerned to have the road declared a Class III road, but he contends that, as the County boundary runs along the midline of the road, either the Waikato County Council has no jurisdiction to classify the whole width of the road, or, alternatively, it has no jurisdiction to classify only half of the road.

No evidence was laid before me as to whether the Franklin County has made any classification of the road or not, although it seems from a letter dated May 11, 1950 (to which I shall refer later), written by that County to the Waikato County that it intended to do so. I must assume, in the absence of any proof to the contrary, that the Franklin County has not made any classification of this road—or, more accurately, its half of it—but, in my view, it does not make any difference whether it has or not. The answer to Mr. *Gould's* point lies in the construction of Reg. 3 of the Heavy Motor-vehicle Regulations, 1950.

Clause 1 provides that the local authority "having control of any . . . road," &c., may declare that such road belongs to some one of the following classes, &c.

Clause 3 provides that "The controlling authority . . . shall give public notice," &c.

It is clear that the draftsman has changed the language and used the term "controlling authority" so that he may thereby cover the Minister of Works and the Main Highways Board, each of whom is vested with similar authority in respect of Government roads and State or main highways as well as local authorities. Thus, a local authority under cl. (1) such as this County Council is clearly a "controlling authority" within the meaning of cl. 3. The use of the words "such classification" in cl. 3 also clearly refers back to the classification mentioned in cls. 1 and 2, so that the "controlling authority" is clearly the authority making the classification.

"Controlling authority" is defined in Reg. 1 (3) of the Heavy Motor-vehicle Regulations, 1950, as meaning "the . . . local authority . . . having over any road or street the control referred to in s. 116 of the Public Works Act, 1928."

Turning to s. 116 of the Public Works Act, 1928, this reads as follows:

"All roads, except as herein otherwise provided, shall be under the control of and may be constructed and repaired by the Road Board of the district in which such roads are situate, and shall be called district roads."

It is clear that the control referred to in s. 116 of the Public Works Act, 1928, must arise from the situation of the

particular road in question in the district of a particular Road Board.

In respect of County Councils, s. 113 of the Public Works Act, 1928, declares that the County Council may make county roads *throughout* the county, &c., and by s. 115 it is provided that the powers, rights, duties, and liabilities hereby vested in and imposed upon a Road Board in respect of a district road shall be vested in and imposed upon the County Council in the case of a county road.

Clearly, therefore, the powers of control, &c., exercisable by a County Council over county roads are confined, in the same manner as in s. 116, to county roads of the county in which such roads are situate. If such roads are not physically situate in the county, then the County Council has no control over them.

In respect of boundary roads, s. 120 (1) (a) of the Public Works Act, 1928, expressly provides that the Governor-General may by warrant, &c., direct which of the local authorities of the districts along the boundaries of which (as in this case) the road lies *shall have control* of such boundary road or street or of any part thereof.

In my view, in respect of boundary roads this is one of the clear exceptions contemplated in s. 116, which is expressed to be "except as herein otherwise provided."

Unless, therefore, there be a special order under s. 117 or a direction by the Governor-General under s. 120, I can see nothing in the Public Works Act, 1928, which leads me to any conclusion other than that the "control" referred to in s. 116 of the Public Works Act, 1928, so far as County Councils are concerned, is vested in them only in respect of county roads situate *within the county*.

Clearly, at the most, therefore, in the absence of a direction under s. 120 of the Public Works Act, 1928, as only one half of this road lies within the County, the County only has control thereof to the lateral midline of the road under s. 116 of the Public Works Act, 1928, and is at the most a "controlling" under the Regulations to the midline of the road.

Apart from the ludicrous situations which could arise if a local body was empowered to classify "its half" of a road, a perusal of the Regulations themselves discloses nothing which I can see which suggests such to be the position. Indeed, the Regulations, dealing as they do with large four-wheeled vehicles, usually of considerable width, appear to concern themselves only with roads in their entirety, as one would expect. In my view, therefore, this County is not a "controlling" "authority" in respect of this road in so far as the County boundary reaches only to the midline thereof. Consequently, I hold the purported classification of the whole road by this County is invalid.

Nor do I think the position is altered in any way if the Franklin County Council has also classified this road as Class III. Clearly, for the reasons I have given, it too is not a "controlling" "authority" in respect of this road, and any purported classification by it would similarly be ineffective.

I may say I am strengthened in this view by Reg. 3 (9) of the Heavy Motor-vehicle Regulations, 1950, which not only gives the Minister an overriding authority but also seems to give him power to deal with such a situation as this.

There remains to consider the correspondence between the two Counties over this road. Although those letters were not produced at the hearing, but were filed by Inspector Sanders with his memorandum, and may not be strictly in evidence, I propose to deal with them, as I do not think they affect the conclusion at which I have arrived.

Apparently, the portion of the boundary road where the alleged offences occurred had for some years past been maintained by the Franklin County. By letter dated November 13, 1946, that County wrote to the Waikato County suggesting that the latter Council should maintain a section of the road for its whole width while the former should similarly maintain the balance. To this eminently sensible arrangement the Waikato County Council agreed, and since then each County has maintained its section of the road accordingly. The letters, however, make no reference to *control* in any way, but speak entirely of "maintenance" and "maintenance costs," and, in my judgment, amount only to an agreement in respect of the maintenance of the road. This is further borne out by the two letters of May 11 and May 22, 1950. The letter of May 11 from the Franklin County to the Waikato County Council, after referring to the fact that the County is seeking the permission of the Minister to classify all the roads in the County as Class III, says in reference to this boundary road: "*Your Council is the authority in control of one side of this road.*" The County Clerk then goes on to point out that it would hardly do for one County to gazette one side of the road as Class III and the other authority to gazette the other side as Class II. (I must say I agree, as I have already indicated). The Waikato County Council in reply agreed by its letter of May 22 to classify *the portion of the Pokeno-Miranda road in this County as Class III. portion of the Pokeno-Miranda road in "this County" as Class III.*

At first glimpse, I thought that possibly this arrangement may have amounted to a mutual transfer of the control of parts of this road, which may possibly have taken it outside the provisions of s. 116 of the Public Works Act, 1928, which is expressed to be "except as herein otherwise provided." It is quite clear, however, from the two letters I have referred to, that, far from handing over control of the sections they respectively maintain to each other, the Counties have been careful to preserve and respect each other's rights as "controlling authorities" for the purposes of these very Regulations.

Apart from this, it is clear that, under the Public Works Act, 1928, a transfer of "control" over county roads can be effected only by the methods set forth in s. 117 or s. 120: *Expressio unius alterius exclusio*.

The only other matter raised by counsel and Inspector Sanders was the question of some form of permission for this vehicle to operate over the Miranda-Waitakaruru Road—I pre-

sume under Reg. 4 (2) of the Regulations. That is not a matter which concerns me in the slightest. That is solely a matter for the Council and its expert advisers, and it would be presumptuous on my part to express any opinion on it.

The informations Nos. 74 and 75 of 1951 are dismissed. In respect of the other information (No. 115), the defendant will be convicted and fined £2 10s. and costs.

*Defendant convicted accordingly.*

Solicitors for the defendant: *Morpeth, Gould, Wilson, and Dyson* (Auckland).

### *In re MANNING (DECEASED).*

1952. March 28, April 10, No. 2 Land Valuation Committee, Mr. J. W. KEALY, S.M., Chairman, at Auckland.

*Valuation of Land—Value for Death-duty Purposes—Residential Property—Method of Valuation best calculated to show Correct Value under Existing Conditions—Replacement Cost based on conscientiously prepared Replacement Cost Estimates—“Capital Value”—Valuation of Land Act, 1925, s. 2—Land Valuation Court Act, 1948, s. 32—Death Duties Act, 1921, s. 70.*

In 1940, a house was built at a cost of £1,134 9s. 5d., the section costing the further sum of £425. It was occupied by the owner and her family until her death on May 18, 1951, when the existing Government valuation was £1,760. The property was valued for death-duty purposes by the Valuation Department at £3,125. On objection to that valuation,

*Held*, 1. That the “premium” which, under existing conditions of shortage of homes, certain purchasers are compelled to pay when buying a house of which vacant possession is available, and which represents an addition to the value of the land plus the cost of the buildings upon it, does not form part of the “capital value” as defined in s. 2 of the Valuation of Land Act, 1925.

2. That the amount which has to be ascertained is the true value of the property for sale purposes, and, when, as in the present case, that value, when ascertained, is to be used as the basis of a substantial tax, the “capital value” to be fixed should, as far as is reasonably practicable, be a stable one; consequently, violent and purely temporary market fluctuations unrelated to building costs should be excluded if this is legally possible.

3. That the method best calculated to show the correct value under conditions such as existed at the date of the

owner's death was to assess the market value of the land (the unimproved value), and, where the improvements were not unsuitable or unsaleable or did not represent unwise expenditure, to add the reasonable cost (less depreciation, &c.) of the improvements.

4. That it would not be equitable in the present case to abandon conscientiously prepared replacement cost estimates, which can be the subject of careful checking, for mere "opinion" evidence unsupported by factual data.

5. That the valuation of the property should be assessed for taxing purposes as follows: Capital value, £2,980; Unimproved value, £840; Value of improvements, £2,140.

OBJECTION to valuation. The facts as proved before the Committee were found to be as follows:

In 1940, a house was built at Masons Avenue, Herne Bay, Auckland, at a cost of £1,134 9s. 5d., the section costing a further sum of £425. From 1940 until 1951, the property was occupied by the owner, Mrs. A. R. Manning, and her husband and daughter.

Mrs. Manning died on May 18, 1951, and her husband and daughter had continued to occupy the house. The property had been valued for death-duty purposes by the Valuation Department at £3,125, and against this assessment the objector appealed. At the date of Mrs. Manning's death, the then-existing Government valuation of the property was £1,760.

Mr. C. H. Webb, a valuer called in support of the objection, gave evidence that, in his opinion, the value of the property at the date of Mrs. Manning's death was £2,970. In reaching this figure, he used what is called the "replacement cost" method, but admitted, in reply to questions, that he would anticipate that a price of up to £3,300 might have been obtained had the property been offered for sale on the open market at the date of deceased's death.

Mr. McIndoe, who gave evidence as to value on behalf of the Department, also stated that he had used the "replacement cost" method in reaching his figure of £3,125. He further stated that, if called upon to advise a prospective purchaser, he would have said: "My valuation is £3,125. Go and look at it. If you like it, pay up to £3,500, because, if you don't like it, someone else will." Both valuers were in agreement as to the amount of the "unimproved value" of the land.

S. C. Clarke, for the objector.

*Cur. adv. vult.*

The judgment of the Committee was delivered by

KEALY, S.M. The Committee is satisfied that, on a replacement basis, £2,980 would be a reasonable valuation. Mr. Webb's figure is increased by £10, because the Committee is satisfied that he made an error of some three to six months in estimating the age of the house. Mr. McIndoe's figure, on the other hand, is reduced, because, in addition to one or two minor factors,



he failed, in the Committee's opinion, to make a sufficient allowance for an adverse feature of design resulting in roof leaks which have proved difficult to eliminate.

It was argued on behalf of the Valuation Department, however, that the Committee is precluded from fixing any figure lower than £3,125 as the value of the property by reason of the opinions expressed by both valuers to the effect that a price of more than that amount could have been secured on the market, and the Committee was referred to the definition of "capital value" as contained in s. 2 of the Valuation of Land Act, 1925. This definition reads as follows:

"'Capital value' of land means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realize at the time of valuation if offered for sale on such reasonable terms and conditions as a *bona fide* seller might be expected to require."

The real point at issue is, of course, whether or not the "premium" which, under present-day conditions of shortage of homes, certain purchasers are compelled to pay when buying a house of which vacant possession is available, and which premium represents an amount additional to the value of the land plus the cost of buildings on it, forms part of the "capital value" as defined in the Act.

What has to be ascertained is the true value of the property for sale purposes, and, when, as in the present case, that value, when ascertained, is to be used as the basis of the assessment of a very substantial tax, one would assume that the intention of the Legislature would be that, so far as was reasonably practicable, the value to be fixed should be a stable one. In the case, for example, of shares, which an executor would normally be at liberty to realize, the position might well be different from that of real property, which would in many cases (as in the present) of necessity be retained as the family home of the near relatives of the deceased.

It would therefore seem in all such cases eminently to be desired that violent, and purely temporary, market fluctuations unrelated to building costs should be excluded if this is legally possible.

It is well-established law that a value could not be held proved merely because on individual, ill informed as to property values, was prepared to come forward and say: "I would have been prepared to give that figure for it if it had then been offered to me."

Where is the line to be drawn? It would at least seem that, if mere estimates of selling values, unsupported by evidence of actual sales, firm offers, or costs, were to be relied upon, very clear and definite evidence would be needed. It would also seem reasonable to suppose that the type of purchaser contemplated by the Act was a prudent, willing, and well-informed purchaser, who studied the market and acted accordingly, and not a purchaser who, by reason of his own desperate

need for housing accommodation, was prepared to pay a figure substantially in excess of that which a prudent and informed purchaser would consider to be the true value of the property.

Such being the position, it would seem that the method best calculated to show the correct value under conditions such as exist to-day would be to assess the market value of the land (unimproved) and add to that the reasonable cost (less depreciation, &c.) of the improvements. That is, of course, in a case such as the present, where it is not contended that any of the improvements are unsuitable or unsaleable or represent unwise expenditure.

It is surely significant that this is, in fact, the method which was adopted by both valuers, the Valuation Department's argument as to sales values being in effect introduced primarily to counter the suggestion that the Department's valuer's estimate of the replacement cost of the house was excessive, and was consequently not in fact what it purported to be—namely, a correct estimate of replacement cost. The Department itself did not ask the Committee to fix a value higher than that estimated by its own witness as the replacement cost.

It would not be equitable, in the view of the Committee, in a case such as this to abandon conscientiously prepared replacement cost estimates, which may be made the subject of careful check, for the vagaries of mere "opinion" evidence unsupported by factual data. While there are, no doubt, cases where it is necessary to rely on such "opinion evidence," the present would not seem to be one of them.

For this reason, therefore, as well as because we consider that the Legislature did not intend to include what has in some quarters been described as "key money" in a valuation of real property assessed for taxing purposes, this appeal will be allowed and the valuation of the property in question fixed as follows:

<i>Capital Value</i>	<i>Unimproved Value</i>	<i>Value of Improvements</i>
£2,980	£840	£2,140

*Valuation fixed accordingly.*

Solicitors for the objector: *Matthews, Clarke, and Burns* (Auckland).

## WILLIAMSON v. WAIKATO COUNTY.

1952. January 22, February 11, before Mr. S. L. PATERSON, S.M., at Hamilton.

*Nuisance—Fire Authority engaged in dealing with Peat Fire—Hose with Planks' Protection on Each Side laid across Road—Truck-driver braking hard on approaching Hose and damaging Truck—No Appreciable and Practical Interference with Use of Road—No Negligence or Breach of Duty on Part of Fire Authority's Servants—Forest and Rural Fires Act, 1947, ss. 44, 45.*

The occupier of a farm situated at T. Road called upon the defendant corporation for assistance in dealing with a peat fire. The corporation was a Fire Authority under the Forest and Rural Fires Act, 1947; and its overseer, who was also the County Fire Officer under the statute, ordered the County foreman to take men and gear to fight the fire. These County employees took to the scene of the fire a trailer pump, a 2-in. hose, and some planks. The only water available in the locality was in a deep drain, on the opposite side of the road from the fire. Accordingly, the pump was placed at the side of the drain and the hose was taken across the road to the scene of the fire. In order to protect the hose from damage by passing vehicles, some planks were laid on the road surface on each side of the hose. These planks were 9 in. wide, and on one side of the hose they were 1½ in. thick, and on the other 2 in. thick, and, with the 2-in. hose, they made an object 20 in. wide across the road.

The plaintiff was the owner of a Ford V 8 truck, which two of her boarders took to get a load of wood for her. One of them, H., who did not have a driver's licence, was driving the truck at about 10.15 a.m. along T. Road in a southerly direction when the truck came upon the hose and planks across the road. H. braked hard, causing the truck to run off the road and overturn, whereby it was damaged.

In an action claiming as damages an amount representing the damage done to the truck, on the alternative grounds of nuisance and of negligence on the part of the defendant corporation's servants.

*Held*, 1. That, in so far as the hose and planks were an obstruction, it was of a temporary nature, and did not amount to a nuisance, as there was nothing unreasonable in the laying of the hose across the roadway or in protecting it from traffic by using the planks, and the hose and planks presented no hazard to a vehicle driven with ordinary care.

2. That there was no negligence or breach of duty on the part of the defendant County's servants; and that the damage to the truck was due to the negligence of the truck-driver in not keeping a proper look-out and in driving at an excessive speed.

*Searle v. Metropolitan Water Sewerage and Drainage Board* ((1936) 13 L.G.R. (N.S.W.) 115) followed.

*Benjamin v. Storr* ((1874) L.R. 9 C.P. 400) and *Butterfield v. Forrester* ((1809) 11 East 60; 103 E.R. 926) applied.

*Ware v. Garston Haulage Co., Ltd.* ([1943] 2 All E.R. 558) explained.

ACTION claiming damages.

On Wednesday, June 13, 1951, the occupier of a farm situated at Telephone Road, Puketaha, in the Waikato County, called upon the defendant corporation for assistance to deal with a peat fire on the farm. The corporation was a Fire

Authority under the Forest and Rural Fires Act, 1947, ss. 44, 45, and Mr. Winter, the County overseer, who was also the County Fire Officer under the Act, ordered the County foreman to take men and gear out and fight the fire. These County employees took to the scene of the fire a trailer pump, a 2-in. hose, and some planks. The only water available in the locality was in a deep drain, on the opposite side of the road from the fire. Accordingly, the pump was placed at the side of the drain and the hose was taken across the road to the scene of the fire. In order to protect the hose from damage by passing vehicles, some planks were laid on the road surface on each side of the hose. These planks were 9 in. wide, and on one side of the hose were 1½ in. thick and on the other 2 in. thick, making, with the 2-in. hose, an object 20 in. wide right across the road.

The plaintiff was the owner of a Ford V 8 truck. She was also a boarding-house proprietor, and in June, 1951, on account of a strike in the mines, she was short of fuel. On June 13, two boarders, Mitchell and Holingshed, offered to take the plaintiff's truck and get a load of wood for her. Permission was given by her husband, who appeared to take some part in the management of her affairs, and the two boarders set out, with Mitchell driving. After proceeding a short way, they changed over, and Holingshed became the driver. Holingshed had not a driver's licence, and he was not driving with the knowledge or permission of plaintiff or her husband. At about 10.15 a.m., while proceeding along Telephone Road in a southerly direction, the truck came upon the hose and planks across the road, and Holingshed, the driver, braked hard, causing the truck to run off the road and overturn, whereby it was damaged, it was alleged, to the extent of £53 7s.

The plaintiff now sought to recover this amount from the defendant, upon the grounds (a) that the hose and planks placed upon the surface of the highway by the defendant's servants acting in the course of and within the scope of their employment created an obstruction on the highway constituting a nuisance to the users thereof, whereby the damage aforesaid was caused to the plaintiff; (b) alternatively, that the defendant's servants were negligent in failing to give adequate warning of the presence of such obstruction on the highway, in consequence whereof the plaintiff's driver was caused to take violent action to stop to avoid hitting it, resulting in the damage aforesaid.

*Murray*, for the plaintiff.

*Swarbrick*, for the defendant.

*Cur. adv. vult.*

PATERSON, S.M. The law regarding actionable nuisance is stated in *Charlesworth on Negligence*, 2nd Ed. 136, as follows:

"It is a public nuisance to do any act on a highway which  
"hinders or obstructs the free passage of the public along  
"the highway, and for any damage sustained by an individual  
"in consequence of such act, over and above the damage  
"sustained by the public at large, an action will lie. The  
"circumstances which give rise to such an action by an

"individual member of the public may conveniently be considered as part of the law of negligence, because of the breach of duty which takes place whenever an obstruction or danger in the highway is created."

Plaintiff relied upon the case of *Ware v. Garston Haulage Co., Ltd.* ([1943] 2 All E.R. 558), in which *Scott, L.J.*, said: "If anything is left on the road which is likely to cause an accident through being an obstruction . . . and an accident results, there is an actionable nuisance" (*ibid.*, 559).

This case, however, did not make new law, and was, as *Lord Greene, M.R.*, pointed out in *Maitland v. Raisbeck* ([1944] 2 All E.R. 272), a case of very special facts, and it would be quite wrong merely because a case got into the reports to pick out of it sentences and treat them as of general application.

Whether or not in any particular case an actionable nuisance has been created is a question of fact. No hard-and-fast rule can be laid down. Many obstructions are of a temporary nature, and may or may not create nuisances. The test would appear to be whether there is an appreciable and practical interference with the full and free use by the public of this right of passage, or, as put by *Honyman, J.*, in *Benjamin v. Storr* ((1874) L.R. 9 C.P. 400, 402): "whether or not the obstruction of the street was greater than was reasonable on point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience."

In *Maitland v. Raisbeck* ([1944] 2 All E.R. 272) the Court was of opinion that the obstruction on the highway did not *ipso facto* and immediately constitute a nuisance, but, if allowed to be an obstruction for an unreasonable time or in unreasonable circumstances, it could become a nuisance.

The issue must always resolve itself into whether or not the defendant has been guilty of a breach of duty in placing an obstruction on the highway which is likely to cause injury to the users and has not taken precautions to give a warning thereof. Before a person who claims damages by reason thereof can succeed, he must establish two things—namely, (a) the breach of duty or negligence of the defendant, and (b) no want of ordinary care on his own part. As *Lord Ellenborough, C.J.*, correctly put it in *Butterfield v. Forrester* (1809) 11 East 60; 103 E.R. 926): "Two things must concur to support this action, 'an obstruction in the road by the fault of the defendant, and 'no want of ordinary care to avoid it on the part of the plaintiff'" (*ibid.*, 61; 927).

The whole law relating to damages for nuisance on the highway is admirably summed up in the headnote to the judgment of the Full Court of New South Wales in *Searle v. Metropolitan Water Board* ((1936) 13 L.G.R. 115). I have not the benefit of the full report. The following quotation is from 26 *Australian Digest*, Col. 732:

"Negligence is not proved by merely showing that something was placed on a footpath in broad daylight. The question in every case is whether it might be reasonably

"inferred that the thing was in the nature of a trap or some other danger of a kind calling for some protection or warning. Merely to prove the temporary placing of something on a highway is not of itself evidence of nuisance. The question is whether the thing proved to have been so placed on the highway was so unsubstantial as not to be capable of being regarded as an obstruction."

To succeed in the action, the plaintiff must therefore prove that the hose and planks placed across the road by the defendant's servants constituted an appreciable and practical interference with the full and free use of the road, so that there was a duty on the defendant's servants to give warning of the obstruction. This duty would not arise unless the obstruction was in the nature of a trap or concealed hazard. He must also establish that there was no want of care on his own part.

The evidence satisfies me that, in so far as the hose and planks were an obstruction, it was of a temporary nature, and did not amount to a nuisance. There was nothing unreasonable in the laying of a lead of hose across the roadway, or in protecting it with the planks from damage from passing traffic. Neither the hose nor the planks were more than 2 in. thick, and they presented no hazard to a vehicle driven with ordinary care. There is ample evidence that other vehicles crossed the obstruction without mishap. The obstruction was not hidden, and the road was straight. One of plaintiff's witnesses said that he could see the hose 100 yds. away. Mitchell, who at the time said he was the driver, pointed out the position on the road from which he saw the hose and this, on measurement, proved to be 2 in. short of 2½ chains. Winter, the County overseer, measured skid marks made by the truck, and these began 79 ft. from the hose, and were straight for 56 ft. and then curved 18 ft. to the side of the road. Further back, there were marks which indicated a light application of the brakes.

I am not prepared to accept the evidence of Mitchell and Holingshed that they did not see the fire or other signs of the fire-fighters. Up until the opening of the case in Court, they had maintained that Mitchell, and not Holingshed, was the driver. I think that, having damaged the plaintiff's truck, they were seeking to exculpate themselves.

Nor am I satisfied that they were truthful regarding the speed of the truck. If they had been driving at 30 m.p.h. to 35 m.p.h., there should have been no difficulty in stopping within the 2½ chains from where it was pointed out by Mitchell they first saw the hose. The length of the skid and the spinning around of the truck before it left the road both indicate that it was being driven at an excessive speed. McLeod, one of the witnesses, said that he saw the truck coming 200 yards away, travelling fast and wobbling. It spun around on the road, and then turned two somersaults into the fire. It left the road before it reached the hose.

I find, therefore, that the hose and planks did not constitute a nuisance, that there was no negligence or breach of duty on the part of the defendant's servants, and that the damage to the

truck was due to the negligence of the driver in not keeping a proper look-out and in driving at an excessive speed.

In view of these findings, it is not necessary for me to express any opinion on the interesting question whether, being driven by an unlicensed driver, the truck was lawfully on the road, or on the effect of ss. 44 and 45 of the Forest and Rural Fires Act, 1947.

Judgment will be for the defendant with costs.

*Judgment for defendant.*

Solicitors for the plaintiff: *Tompkins and Wake* (Hamilton).

Solicitors for the defendant: *Swarbrick and Swarbrick* (Hamilton).

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### SHAW v. THORP.

1952. June 6, before Mr. W. H. FREEMAN, S.M., at Rotorua.

*Transport—Offences—Carrying on Unlicensed Goods-service—Carriage of Goods by Heavy Motor-vehicle—Exceptions—Test to be applied—“Goods-service”—Transport Act, 1949, s. 96.*

The “route that includes the railway” in s. 96 (2) (a) of the Transport Act, 1949, is the “available route for the carriage of goods that includes not less than thirty miles of open Government railway” mentioned in s. 96 (1).

Consequently, the test to be applied is the available route that includes thirty miles of open Government railway, and not the rail route between two places.

INFORMATION charging the defendant with carrying on a goods-service otherwise than pursuant to the authority of and in conformity with a goods-service licence granted under Part VI of the Transport Act, 1949, contrary to the provisions of s. 95 of that Act.

The admitted facts were that the defendant carried timber from Rotorua to Tawa Flat by a heavy motor-vehicle that was designed exclusively or principally for the carriage of goods; that the road distance between Rotorua and Tawa Flat was 285 miles and the rail distance was 416 miles 50 chains; that the road distance between Rotorua and Waiouru was 149 miles;

and that the rail distance between Waiouru and Tawa Flat was 173 miles 15 chains.

*R. T. Dixon*, for the informant.

*R. A. Potter*, for the defendant.

*Cur. adv. vult.*

FREEMAN, S.M. The prosecution contends that, by virtue of the provisions of s. 96 of the Transport Act, 1949, the defendant has been carrying on a goods-service in contravention of s. 95 of that Act. Section 96 reads as follows:

"(1) Subject to the provisions of this section, and without limiting the meaning of the expression 'goods-service' in subsection one of section two of this Act, the carriage of any goods from one place to another (whether for hire or reward or not) by a heavy motor-vehicle that is designed exclusively or principally for the carriage of goods shall be deemed for the purposes of this Part of this Act to be a goods-service within the meaning thereof if there is between those places an available route for the carriage of goods that includes not less than thirty miles of open Government railway.

"(2) The foregoing provisions of this section shall not apply—

"(a) Where the route that includes the railway is longer "by more than one-third than the shortest road route available between the two places:

"(b) Where the owner of the motor-vehicle is carrying "on business as a farmer or market-gardener, and "the goods are carried in connection with that business:

"(c) Where the owner of the motor-vehicle is the Crown "or a local authority or public body."

For the defendant, it is submitted that he comes within the exception provided by subs. 2 (a) of the section, and that a licence is not required.

The first point to settle is whether there is between Rotorua and Tawa Flat an available route for the carriage of goods that includes not less than thirty miles of open Government railway.

"Available" means "capable of being turned to account"; hence, at one's disposal.

Obviously there is an available route from Rotorua to Tawa Flat that comprises 149 miles of road and 173 miles of open Government railway. Unless, therefore, the defendant is protected by subs. 2 (a), he must be convicted.

In essence, it is contended by the defendant that the correct measuring-rod is to take the mileage of the shortest road route between Rotorua and Tawa Flat, add a third, and compare the result with the total rail distance between those two places. If the rail route is longer than the road route plus the third, then no licence is required.



On the other hand, the prosecution contends that "the route that includes the railway" referred to in subs. 2 (a) refers to the "available route for the carriage of goods that includes not less than thirty miles of open Government railway" mentioned in s. 96 (1).

In answer to this contention, counsel for the defendant submits that this involves reading the word "available" into subs. 2 (a) before the word "route," and that nothing must be read into the section that is not therein clearly defined.

I do not think it necessary to read the word "available" into subs. 2 (a) in order to arrive at the meaning submitted by the prosecution to be the meaning of subs. 2 (a).

I think it is inescapable that the "route that includes the railway" referred to in subs. 2 (a) is the "available route for the carriage of goods that includes not less than thirty miles of open Government railway" mentioned in s. 96 (1).

It follows that the available route from Rotorua to Tawa Flat that comprises 149 miles of road and 173 miles 15 chains of open Government railway—a total of 322 miles 15 chains—is an available route that is not longer by a third than the shortest road route.

In effect, the defendant contends that "the available route for the carriage of goods that includes not less than thirty miles of open Government railway" must be confined to the rail route between the two places. It is not the rail route that is the test to be applied. It is the available route that includes thirty miles of open Government railway.

For the reasons given, therefore, I do not consider that the defendant comes within the exception referred to.

On the question of penalty, I think I must take into account the fact that the defendant applied for a licence, but his application was dismissed by the No. 4 Licensing Authority, on the grounds that a licence was not required.

This fact does not afford a substantive defence to the charge, as *mens rea* is not an essential. It is a fact, however, that operates in mitigation of the offence.

The defendant will therefore be convicted and ordered to pay costs of Court. Solicitor's fee £3 3s.

*Defendant convicted.*

Solicitor for the Transport Department: *Transport Department Solicitor* (Wellington).

Solicitor for the defendant: *R. A. Potter* (Rotorua).

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BROWNIE AND COMPANY, LIMITED v.  
WANGANUI CITY CORPORATION.

1952. September 18, 24, October 8, 29, before Mr. A. COLEMAN, S.M., at Wanganui.

*Municipal Corporations — Nuisance — Negligence — Removal of Tram-tracks and filling in Excavations preparatory to resealing Roadway—Natural User of Street—Shop Window broken by Metal propelled from Spoil by Vehicular Traffic—Corporation not bound to take Extravagant Precautions against Such Happening—Inevitable Result of Exercise of Statutory Powers—Corporation not Liable on Grounds of Nuisance or Negligence—Municipal Corporations Act, 1933, ss. 173, 175.*

The acts of a city corporation in filling in excavations caused by the removal of tram-tracks and in dealing with the work and the street preparatory to resurfacing the roadway constitute a natural user of the roadway within the powers given by s. 175 of the Municipal Corporations Act, 1933.

Road metal spread evenly upon a level road does not come within the definitions of dangerous substances as being likely to do mischief if it escapes and as having an inherent power of escape.

*Rylands v. Fletcher* ((1886) L.R. 1 Ex., 265; aff. on app., (1868) L.R. 3 H.L. 320) distinguished.

The duty of repairing streets is one of the primary duties which municipal corporations are called upon to perform, and it involves the supply of road metal and its application to the street surface. If the work is carried out according to standard engineering practice and cannot be done in any other way, the corporation is not liable for the creation of a nuisance within the meaning of s. 173 of the Municipal Corporations Act, 1933.

*Blamires v. Lancashire and Yorkshire Railway Co.* ((1873) L.R. 8 Ex. 283), *Great Western Railway Co. v. Davies* ((1878) 39 L.T. 475), *Keeble v. East and West India Dock Co.* ((1889) 5 T.L.R. 312), and *Wright v. Midland Railway Co.* ((1884) 51 L.T. 539; rev. on app., (1885) 1 T.L.R. 406) followed.

The breaking of a window of a shop facing the street where the work was being done, by road metal propelled by vehicular traffic from the spoil from the excavations on the roadway, is an inevitable result of the exercise of the statutory powers.

*Manchester Corporation v. Farnworth* ([1930] A.C. 171) followed.

What is habitually done in the same, or in similar, circumstances furnishes a test of reasonable care; and, where simple operations are being performed, persons are not as a rule required to guard against every conceivable

result of their actions or to take extravagant precautions. Thus, it would be unreasonable to employ men for twenty-four hours a day for eight or nine weeks throughout the year in a business area in order to guard against the eventuality of a stone from a municipal corporation's road work striking a shop window.

Early in 1951, the defendant Corporation, which was a "tramway authority" as defined by the Tramways Act, 1908, commenced the work of removing the tram-tracks throughout the city of Wanganui.

The plaintiff company owned and occupied business premises in Victoria Avenue, Wanganui, past which the tram-tracks ran. The actual removal of the tracks and sleepers was performed for the defendant by independent contractors; but the defendant itself undertook and did the work of filling in the excavations caused by the removal of the rails and sleepers and of resurfacing the damaged roadway, and, subsequently, of bituminizing the resurfaced area. The tram-tracks in front of, and for a considerable distance on each side of, the plaintiff's premises were removed on April 10, 1951, and were sealed with bitumen on June 25, 1951.

On or about June 6, 1951, one of the plate-glass windows in the plaintiff company's premises was broken. It alleged that this was caused by the negligence of the defendant Corporation in allowing spoil and road metal from the excavations to lie on the unexcavated surface of that part of the roadway, so that vehicular traffic permitted by the defendant Corporation to pass over and along the street caused a stone or stones to be propelled from the spoil lying on the roadway against the plate-glass window of the plaintiff's business premises, whereby it was broken. The plaintiff claimed damages for the value of the glass and the signwriting thereon, on the grounds of negligence and of nuisance.

*Held*, 1. That the defendant Corporation had taken all reasonable care in carrying out the work which, it was alleged had resulted in damage to the window, and was not in any way negligent.

2. That the road works were a necessary nuisance created under statutory authority; and the defendant Corporation had discharged the onus of proving the inevitability of the result of the exercise of its statutory powers, and, accordingly, it was not liable on the ground of nuisance.

**ACTION** to recover £41 17s. 11d. as damages for alleged negligence by the defendant Corporation in carrying out certain public works, or, in the alternative, for damages arising through nuisance created by the Corporation in carrying out those works.

The defendant Corporation, which was a "tramway authority" as defined by the Tramways Act, 1908, early in 1951 commenced the work of removing the tram-tracks throughout the City of Wanganui, for the reason that a motor-bus

service had been established in place of the electric tramway system previously in operation.

The plaintiff company owned and occupied business premises in Victoria Avenue, Wanganui, past which the tram-tracks ran. The actual removal of the tracks and sleepers was performed for the Council by independent contractors, but the Council itself undertook and did the work of filling in the excavations caused by the removal of the rails and sleepers and of resurfacing the damaged roadway, and, subsequently, of bituminizing the resurfaced area. Victoria Avenue is a bitumen street. The tram-tracks in front of, and for a considerable distance on each side of, the plaintiff's premises were removed on April 10, 1951, and were sealed with bitumen on June 25, 1951. The plaintiff alleged that on or about June 6, 1951, one of the plate-glass windows on its premises was broken, and it said in its statement of claim that this was caused by the negligence of the defendant in allowing spoil and road metal from the excavations to lie on the surface of that part of the roadway which had not been excavated, so that vehicular traffic permitted by the defendant to pass over and along the street caused a stone or stones to be propelled from the spoil lying on the roadway against the plate-glass window of the plaintiff's business premises, whereby the window glass was broken. The plaintiff claimed damages for the value of the glass and the signwriting thereon.

In his evidence, Mr. Brownie, the manager of the plaintiff company, stated that in April, 1952, he had a window broken from the same cause, but he made no claim in respect of the first breakage. He said that between April and June he complained several times of the condition of the road, as he was apprehensive that further breakage would occur, to the Council's officers; and it was admitted that some of these complaints were received. Mr. Brownie admitted that some sweeping of the street was done by the Council with its mechanical broom, and also by its employees with hand brooms, but he was of the opinion that much more should have been done in that direction, and also that the sealing with bitumen should not have been so long delayed.

Evidence was given by Mr. Frethey, the City Engineer, of the work done by the Council. The course of operations was that, immediately after the contractor had excavated through the old bitumen and removed the rails and sleepers, the Council's employees followed up and filled in the excavated tracks with the excavated material. This work was usually done on the same day as the excavations were made. New metal was then put on the old material, rolled, watered, and graded. Following this, finer metal of  $\frac{1}{4}$  in. gauge was put in and rolled in. All these works were done as a continuous process. Mr. Frethey said that thereafter the new surface was under constant attention towards consolidation, and was finally ready for sealing with bitumen about the end of May, 1951. It was not sealed until June 25, owing, he said, to unsuitable weather. The damage to plaintiff's window occurred on June 6. Mr. Frethey said that men were put on from time to time to sweep

the road between April 20 and June 25, and he also said that the methods employed to carry out the work of consolidating the surface were in accordance with standard engineering practice, that there was no other way of doing it, and that it was constantly under his supervision.

Mr. Currin, Street Overseer for the Council, in his evidence said that he went over the section of road fronting plaintiff's premises on June 3, 4, 6, and 7, and saw no metal to cause alarm on the road. All he saw were fine and  $\frac{3}{8}$  in. gauge chips near the water-channel. This witness also said that at this time a private lorry driver was carting metal through the street in question every day for a period, and that he had seen metal spill from the lorry on to the street near plaintiff's premises.

Benson, a driver in the employ of the Council, in evidence stated that he had frequently seen metal fall off private lorries passing through Victoria Avenue. Pursuant to the provisions of s. 361 of the Municipal Corporations Act, 1933, the plaintiff's solicitors gave notice to the defendant Corporation of the plaintiff's intention to commence an action for damages for negligence in the terms subsequently set out in its statement of claim.

P. L. Dickson, for the plaintiff.

C. F. Treadwell, for the defendant.

*Cur. adv. vult.*

COLEMAN, S.M. [After stating the facts, as above:] At the commencement of the hearing, counsel for the plaintiff intimated that he was, alternatively, claiming the damages alleged by reason of the nuisance created by the Council which had caused such damage. Objection was taken that, as the grounds in the notice alleged negligence only, it was not open, at that stage, to found the claim on nuisance also. I think that that objection must be overruled. The notice set out the facts and acts complained of fully and clearly, and it is the facts and acts which constitute the cause of action, and not the mere legal terminology used to describe their effect at law. If the acts complained of are clearly and sufficiently set out, it does not matter whether they are alleged to be negligent or to create a nuisance. A cause of action is that particular act on the part of the defendant which gives the plaintiff his cause of complaint. I think, therefore, the plaintiff is entitled to proceed on his alternative grounds.

It is clear, and was admitted by counsel for both parties, that the work done by the Council was a "public work" within the meaning of the Public Works Act, 1903. By s. 2 of that Act, "public work" means, *inter alia*:

"Every work which . . . any local authority is  
"authorized to undertake under this or any other Act".

Section 175 of the Municipal Corporations Act, 1933, vests the freehold of all streets and the soil thereof and all materials of which they are composed in the local authority, which, by subs. 4 (a), is empowered to construct and repair all streets with such materials and in such manner as the Council thinks fit.

Section 391 (1) of the Municipal Corporations Act, 1933, is as follows:

"If in the opinion of the Governor-General the Council  
"wilfully refuses to act in the performance or exercise of  
"the duties or powers respectively reposed and vested in it  
"by or under this Act, or in the like opinion substantially so  
"refuses to act, the Governor-General may make such pro-  
"vision as he thinks fit for the due performance and exercise  
"of such duties and powers either by himself or any other  
"person."

Persons having any estate or interest in land injuriously affected by any public works undertaken by a local authority, or suffering any damage thereby, are entitled to full compensation from the local authority, which compensation is to be determined in the manner provided by the Public Works Act: see s. 171 of the Municipal Corporations Act, 1933 (hereinafter referred to as the "compensation clause"). Section 173 (hereinafter referred to as the "nuisance clause") provides as follows:

"Nothing in this Act shall entitle the Council to create  
"a nuisance, or shall deprive any person of any right or  
"remedy he would otherwise have against the Corporation  
"or any other person in respect of any such nuisance."

I do not think that the plaintiff has discharged the onus upon him of proving that the defendant was negligent in carrying out the work which, he says, resulted in the damage to his window. The standard of care required in all cases is founded on a consideration of the care which would be observed by a prudent and reasonable man. In his evidence, Mr. Frethey, the City Engineer, said that the work was done in accordance with standard engineering practice, that there was no other way of doing it, and that it was constantly under his supervision. What is habitually done in the same, or in similar, circumstances furnishes a test of reasonable care: see *Blamires v. Lancashire and Yorkshire Railway Co.* ((1873) L.R. 8 Ex. 283) and *Great Western Railway Co. v. Davies* ((1878) 39 L.T. 475). In ordinary circumstances, or where simple operations are being performed, persons are not as a rule required to guard against every conceivable result of their actions, or to take extravagant precautions: see *Keeble v. East and West India Dock Co.* ((1889) 5 T.L.R. 312) and *Wright v. Midland Railway Co.* ((1884) 51 L.T. 539; rev. on app., (1885) 1 T.L.R. 406) and cases referred to in *23 Halsbury's Laws of England*, 2nd Ed. 573, para. 826.

It was admitted by Mr. Frethey that the Council could have had men on the job, all day and night, to remove any stones that might be disturbed or dislodged by passing traffic, but that it would not have been reasonable to have done so. Victoria Avenue is the main thoroughfare in Wanganui, and is part of the main highway between Wellington and New Plymouth and Auckland. The damage done to plaintiff's window was caused by a single stone, which might have been disturbed by traffic at any minute of the day or night. Indeed, the evidence indicates that the window probably was broken at

night or in the early hours of the morning. To guard absolutely against such an eventuality would require the employment of men for twenty-four hours a day for a period of eight or nine weeks throughout the greater part of the length of Victoria Avenue.

I think the Council took all reasonable care and was not in any way negligent.

Whether or not the Council created any nuisance and is liable in damages in respect of any such nuisance is more difficult of determination. It was submitted by Mr. *Dickson*, for the plaintiff, that the action of the Council in bringing stones and road metal on to the street and in allowing such stones and metal to be dislodged, and so to become capable of being thrown by passing traffic to the danger of property, constituted an actionable nuisance, and made the Council liable in damages for injury so caused. Counsel submitted that the rule in *Rylands v. Fletcher* ((1868) L.R. 1 Ex. 265; aff. on app., (1868) L.R. 3 H.L. 330) applied. That rule, as formulated in *Salmond's Law of Torts*, 10th Ed. 513, is as follows:

"The occupier of land who brings and keeps upon it any—  
"thing likely to do damage if it escapes is bound at his peril  
"to prevent its escape, and is liable for all the direct conse—  
"quences of its escape, even if he has been guilty of no  
"negligence."

This formula is a correct paraphrase of the judgment of *Blackburn, J.*, in that case, and was approved on appeal to the House of Lords. *Lord Cairns* there laid down a new principle distinguishing the natural from the non-natural user of land, and holding that in the latter case only was the liability absolute. This distinction enables the Court, by determining what is or what is not a natural user of land, to give effect to its own view of social and economic needs. *Salmond* points out, at p. 515, that there has not yet been given by the Bench any definition of the expression "natural user", or any exhaustive enumeration of the kinds of user it would include. The principle in *Rylands v. Fletcher* has been aptly termed "the wild beast theory". It applies to "anything likely to do mischief if it escapes", and, accordingly, the thing must, like a wild beast, or accumulated water, have the power of escape. This power of escape must be inherent, and the principle therefore applies to things essentially dangerous in themselves which are likely to escape and cause damage: see *Clerk and Lindsell's Law of Torts*, 10th Ed. 595, 596, and cases there referred to. It is impossible to define these things precisely. The principle has been applied to water in bulk, fire, gas, explosives, electricity, poison, dangerous animals, paraffin, and a quantity of spoil tipped on the side of a steep hill without any provision for drainage, so that the spoil slid down the hill and did damage. Again, a person who uses his land in the exercise of his ordinary rights incurs no liability if he injures his neighbour. User of this kind is a natural user, and involves no liability under the rule in *Ryland v. Fletcher*; but it is not a natural user of land to bring or collect on it any of the things dangerous

in themselves as set out above, and the distinction between a natural and a non-natural user of land in this connection seems to depend entirely on whether or not the things brought or collected belong to the class of things dangerous in themselves. If the dangerous thing escapes, it is no defence to say it is a natural or ordinary user of the land to have such a thing upon it: *Clerk and Lindsell's Law of Torts*, 10th Ed. 597, and the cases there referred to. Building a house is a natural user of land, and it would appear to follow that it is equally a natural user to supply it with water, gas, and electricity; and a munitions factory in time of war may be a natural user of land: see *Read v. J. Lyons and Co., Ltd.* ([1946] 2 All E.R. 471). As regards the present case, I am of the opinion that the acts of the defendant in filling in the excavations and in dealing with the work and the street during the process of consolidation preparatory to sealing were a natural user of a street vested by statute in the Corporation. The Council is given power to construct and repair streets with such materials and in such manner as it thinks fit: s. 175 of the Municipal Corporations Act, 1933. I think it is undoubted that its acts constituted a natural user. The next question is: Did the Council, notwithstanding its natural user, bring upon the street "any thing likely to do mischief if it escapes"? If it did, then any acts that otherwise would be a natural user become a non-natural user. What the Council did included three things—namely, by its independent contractor it excavated the surface of the road, and by its own employees it filled in the excavations, and then brought metal, clay, and sand to complete the filling in and consolidation by a process of grading, rolling, and watering. The damage was caused by a stone striking the window. In my opinion, road metal, spread evenly on a level road, does not come within the definitions of dangerous substances as being likely to do mischief if it escapes and with an inherent power of escape. It is common knowledge that in New Zealand hundreds of miles of roads are under construction and repair, involving the use of broken metal, every year, and that, under modern engineering practice, the work of consolidation is left to passing traffic preparatory to sealing. Some roads are never sealed. It is, I think, also common knowledge that stones are thrown up by passing vehicles, with frequent damage to car windscreens and otherwise. I know of no reported case where liability for such damage has been placed on the local authority concerned. If there was any such liability, one would expect the reports to include many judgments to that effect. The facts in this case are quite dissimilar to those in *Irvine and Co., Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741), cited by counsel for the plaintiff. In that case, there was an accumulation by the defendant of water in bulk in water-mains under the street. The defendant was held liable for damage caused through the escape of water through a bursting of the mains. But water in bulk has always been held to be a dangerous substance with an inherent power of escape. In my opinion, the facts in the case now before the Court come within the exceptions to the rule in *Rylands v. Fletcher* ((1868) L.R. 3 H.L. 330).



It may, nevertheless, be argued that s. 173, the "nuisance" section of the Municipal Corporations Act, 1933, still renders the defendant liable in damages to the plaintiff. The section reads as follows:

"Nothing in this Act shall entitle the Council to create  
"a nuisance, or shall deprive any person of any right or  
"remedy he would otherwise have against the Corporation or  
"any other person in respect of any such nuisance."

In the absence of any such "nuisance" clause, a plaintiff would be left to any remedy he might have under s. 171, the "compensation" clause, and, in that case, could be met with the defence that no negligence was shown by the defendant. Negligence is not in issue when the damage is occasioned by nuisance, as, in respect of nuisance, the liability for damage is absolute. In the case now before the Court, the defendant submits, as a defence, that what it did was done under statutory authority; and, consequently, it is not liable for the consequences of its acts if done, as I have held, without negligence. In *Irvine and Co., Ltd. v. Dunedin City Corporation* ([1939] N.Z.L.R. 741), *Sir Michael Myers, C.J.*, said: "there are various kinds of authorized public works the construction and maintenance of which necessarily involve the creation and existence of a public nuisance . . . . If, then, s. 173 is to be read as "referable to public nuisances without modification, it would be "in hopeless conflict with the statutory provisions authorizing "the construction and maintenance of the public work" (*ibid.*, 755). And later he said: "the latter provision [s. 173] while "applying to public and private nuisances alike, would not "apply to what may be called a necessary nuisance" (*ibid.*, 756).

The scope of the "nuisance" clause was discussed by *Sir Samuel Griffith, C.J.*, in *Fullarton v. North Melbourne Electric Tramway and Lighting Co., Ltd.* ((1916) 21 C.L.R. 181), where the learned Chief Justice said: "In the case of undertakings "such as railways, tramways, telegraphs or telephones, it is "obvious that the authorized works cannot be carried out without doing many things that are nuisances at common law, "such as the erection of posts and laying of rails on highways "and stretching wires above them. Such nuisances must be "taken to be authorized. The question whether the nuisance "complained of in any particular case is authorized by the "general words of the authority may often arise, and may be "difficult to determine. In order to obviate this difficulty a "practice arose in England of providing in the enabling Act "that nothing in the Act should exempt the undertakers from "liability for nuisance. Such a clause would not, of course, "apply to what may be called a necessary nuisance" (*ibid.*, 188). And, again, in *Irvine's case* ([1939] N.Z.L.R. 741), *Sir Michael Myers, C.J.*, said: "It is tolerably clear upon principle and "apart from authority that s. 173 refers just as much to private "as to public nuisances, subject only to the modification that "the Corporation is not liable to pay damages caused by a "necessary nuisance, whether during construction of the public "work or as a consequence of its user, in respect of which the

"person injured would have been entitled to claim compensation" (*ibid.*, 766). In the same case, *Smith, J.*, said: "How then should the nuisance clause be construed? In my opinion, it applies to all nuisances, whether public or private, and prohibits all nuisances which are not the inevitable result of the exercise of the statutory powers. For the test of inevitability, I adopt, with all respect, the view expressed by Lord *Dunedin* in *Manchester Corporation v. Farnsworth* ([1930] A.C. 171): 'When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common-sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense' (*ibid.*, 784).

In *Irvine and Co., Ltd. v. Dunedin City Corporation*, the Court of Appeal held that the defendant had not discharged that onus of inevitability. In the case now before the Court, I think that the defendant has discharged that onus. It is clear that the duty of repairing streets is one of the primary duties which municipal corporations are authorized to perform. That work commonly involves the supply and application of road metal to the street surface, whether at the final or at an intermediate stage of the work of repair. The evidence of the City Engineer—which was not contradicted—was that the work was carried out according to standard engineering practice and could not have been done in any other way, and that the employment of a staff of sweepers continuously throughout the process of consolidation would have been unreasonable and prohibitive in cost. Having regard to the criterion of inevitability stated by Lord *Dunedin* in *Manchester Corporation v. Farnsworth* ([1930] A.C. 171) that it "is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common-sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense" (*ibid.*, 183), I am of the opinion that the defendant has discharged the onus of proving inevitability, and the plaintiff cannot, therefore, succeed.

Finally, I think I should refer to the possibility raised in evidence that the damage to the plaintiff's window was caused by a stone dropped from the metal-carrier's lorries, and not by a stone brought on to the street by the defendant. One stone did the damage. I think that the probabilities are that the delinquent stone was one of those brought by the Council for the purpose of repairing the street, but it is quite possible that it was not, and, in my opinion, that possibility is not a mere fanciful suggestion.

Judgment for defendant with Court costs, witnesses'

expenses, and solicitors' fee, as per scale. I allow £3 3s. each for the second and third days' hearing.

*Judgment for the defendant Corporation.*

Solicitors for the plaintiff: *Cunningham and Dickson* (Wanganui).

Solicitors for the defendant: *Treadwell, Gordon, Treadwell, and Clayton* (Wanganui).

TAYLOR v. WELLINGTON CITY CORPORATION  
AND HALL.

1952. July 1, November 6, before Mr. J. B. THOMSON, S.M., at Wellington.

*Negligence — Collision on Controlled Intersection between Pedestrian and Motor-car—Pedestrian and Driver subject to Directions of Traffic Inspector controlling Traffic—Traffic Inspector and Other Parties respectively Negligent—Traffic Inspector exercising Delegated Authority from Municipal Corporation—Liability of Corporation.*

A traffic inspector employed by a municipal corporation, when he is engaged in traffic control, is not exercising statutory powers personal to himself, but he is exercising a delegated authority to control traffic; and the corporation is liable for any negligence on his part in the exercise of his duties.

*Stanbury v. Exeter Corporation* ([1905] 2 K.B. 838), *Enever v. The King* ((1906) 3 C.L.R. 969), and *Fisher v. Oldham Corporation* ([1930] 2 K.B. 364) distinguished.

A collision occurred on a pedestrian crossing, between the plaintiff (a pedestrian) and a motor-car driven by one Hall shortly after 5 p.m. in daylight while the plaintiff was crossing Manners Street from Vance-Vivian's corner to the Bank of New Zealand corner at the intersection of Manners and Cuba Streets. The plaintiff commenced to cross after receiving a signal to do so from a traffic inspector employed by the Wellington City Corporation, who was controlling traffic at the intersection. The defendant Hall was proceeding, at about 10 miles per

hour, across the intersection in pursuance of a signal from the inspector to do so.

The impact between the plaintiff and the defendant Hall's car took place at the side of the car; in other words, the plaintiff walked into the car. At the time of the impact the front wheels were about its eastern boundary. The defendant Hall's car was travelling approximately on the west-bound tramline, which at this point was 8 ft. from the kerb.

The plaintiff had no benefit from the fact that the accident happened upon a pedestrian-crossing because the duties laid upon a motorist do not apply where traffic is for the time being controlled by an inspector (Traffic Regulations, 1936, Reg. 14 (9)).

In an action by the plaintiff against the Wellington City Corporation, which employed the traffic inspector, and against Hall,

*Held*, 1. That a reasonably careful pedestrian would not have assumed that she was entitled to proceed without looking, and, in the circumstances, the plaintiff was not taking such care for her own safety as was reasonable.

2. That Hall should have given some attention to the pedestrians who were at the corner waiting to cross; and, at the speed he was travelling (about 10 miles per hour) he could both have seen the plaintiff and could have done something effective to avoid the accident.

3. That the traffic inspector gave a misdirection in signalling pedestrians across in the face of an oncoming car which he himself had directed to proceed; and he was failing in the high standard of performance incumbent on a person controlling the traffic.

4. That the collision was due to the combined negligence of the plaintiff, Hall, and the inspector, the last named being principally at fault; and the apportionment of the responsibility was 30 per cent. to the plaintiff, 20 per cent. to Hall, and 50 per cent. to the inspector.

ACTION claiming damages arising out of a collision which occurred between the plaintiff, a pedestrian, and a motor-car driven by the defendant Hall. The principal facts, as found by the learned Magistrate, are as follows:

The collision took place shortly after 5 p.m. in daylight while the plaintiff was crossing Manners Street from Vance-Vivian's corner to the Bank of New Zealand corner at the intersection of Manners and Cuba Streets. The impact took place on the pedestrian-crossing.

The plaintiff commenced to cross after receiving a signal to do so from Inspector Baillie, a traffic inspector employed by the Wellington City Corporation, who was controlling traffic at the intersection.

The defendant Hall was proceeding across the intersection in pursuance of a signal from Inspector Baillie to do so. The speed of his car was about 10 miles per hour.

The impact between the plaintiff and the defendant Hall's car took place at the side of the car; in other words, the plaintiff walked into the car.

At the time of the impact the front wheels of Hall's car were over the pedestrian-crossing and the rear wheels were about its eastern boundary.

The defendant Hall's car was travelling approximately on the west-bound tramline, which at this point is only about 8 ft. from the kerb.

*Gazley*, for the plaintiff.

*F. H. Jones*, for the first defendant, the Wellington City Corporation.

*R. Stacey*, for the second defendant, Hall.

*Cur. adv. vult.*

THOMSON, S.M. It is necessary to consider whether the collision was due to the negligence in whole or in part of the plaintiff herself, Inspector Baillie or the defendant Hall.

I consider first the conduct of the plaintiff and the defendant Hall.

They moved into collision as a result of directions by the traffic inspector. The plaintiff's case is that she was entitled to rely on the inspector's signal. She has no benefit from the fact that the accident happened on a pedestrian-crossing because under Reg. 14 (9) of the Traffic Regulation, 1936, the duties laid upon a motorist do not apply where traffic is for the time being controlled by an inspector. The abnormal feature of the case is that the motorist is also entitled to say that he relied on the inspector's signal.

The issue in principle is the extent to which by reason of the inspector's signal each absolves himself from a duty of care which would otherwise fall on him or her.

I was not referred to any authority on the point except *Stanley Brock, Ltd. v. Montreal Tramways Co.* ([1942] Que. S.C. 234) referred to in *6 All Canada Digest*, 2708, in a note to the effect that where a tramway motorman continues across an intersection at the signal of a policeman in spite of a red light, he is liable for damages to a motor-car which was proceeding upon a green light. This case involves other elements.

There are many cases dealing with the rights and duties of a pedestrian on an uncontrolled pedestrian-crossing.

I doubt if these authorities are directly in point in the present case, and I prefer to approach the case upon the general principle that both the plaintiff and Hall were under a duty to use ordinary reasonable care in the circumstances which existed for the protection of themselves and others.

I do not think that a reasonably careful pedestrian would have assumed in the present case that she was entitled to proceed without looking.

The accident occurred in daylight. No person relying on the traffic inspector's direction can know that others will

obey it. In fact it is common knowledge that directions through misunderstanding or recklessness or for other reasons are not always obeyed. Such incidents are more likely on an extremely busy intersection such as the Cuba Street-Manners Street intersection about 5 p.m. Giving the fullest weight to the rights of the pedestrian, I am not prepared to hold that in the circumstances of this case the plaintiff was entitled to commit herself to the roadway without taking the simple precaution of casting a glance to see that her action was safe. It is clear that she walked into the car. It was suggested on her behalf that her opportunity of seeing a car coming across the intersection as Hall's car did was limited by the crowd of pedestrians at Vance-Vivian's corner. I doubt this, but, even accepting it, if she had looked at all to her right at the moment of stepping off the footpath she must have seen Hall's car, which would then have been close to the crossing. It is true that we are dealing with a short distance. The plaintiff says that she took not more than three steps before the collision, and I think that three steps is about the distance she must have covered from the kerb to the point of collision—i.e., a distance of about 8 ft. or perhaps a little less. But even in that short distance she had time to look and stop. If she chose to proceed without looking at all as she did, I do not think she was taking such care for her own safety as was reasonable.

In my opinion, the defendant Hall was also negligent. I have held that his speed was low—about 10 miles per hour. This conclusion derives from his own evidence and that of the witness Hardgrave and from a consideration of the probabilities. He was crossing one of the busiest intersections in Wellington at its busiest time. He must have been aware of a crowd of pedestrians at Vance-Vivian's corner waiting to cross. I think that he should have given them some attention and at the speed he was travelling he could have done so. He must have realized the possibility of someone stepping out (as he would think) in breach of the inspector's direction. He was, on his own evidence, travelling in bottom gear and he was on level ground. I think that he both should have seen the plaintiff and could have done something effective in the circumstances to avoid the accident if he had. The distance was not much but his speed and the fact that he was in low gear were greatly in his favour. I think, therefore, that he also was negligent.

I now consider the conduct of the inspector. His evidence, so far as relevant, is as follows. He had been working traffic west to east and east to west, that is to and fro along Manners Street. There were a number of pedestrians waiting to cross from north to south and *vice versa*. Hall's car was the last of a line travelling from the Courtenay Place direction to the direction of the St. George Hotel. The inspector had stopped the traffic from west to east—that is, traffic going in the opposite direction to that of Hall's car. He signalled Hall on and then stopped that line of traffic. He then started pedestrians across between James Smith's corner and the Royal Oak corner. He turned facing west and started north-south traffic in Cuba

Street and signalled pedestrians to proceed between Vance-Vivian's corner and the Bank of New Zealand corner. It was this signal which affected the plaintiff. The inspector then turned again and did not see the collision.

He says that Hall's car was doing 15-20 miles per hour; that when signalled it would be 20 ft. east of the James Smith-Royal Oak pedestrian-crossing; and that when he gave the signal to the Vance-Vivian-Bank of New Zealand pedestrians Hall's car was not across that pedestrian-crossing but was at it.

I think that the inspector is mistaken in the situation of Hall's car when he gave his signal to the pedestrians. If he is right, the accident could not have happened.

The key to what happened may lie in Hall's low speed. Probably the inspector followed a routine which would have been safe if Hall had been travelling at a higher speed, because Hall might have been clear of the intersection before the pedestrians were signalled on.

I accept the proposition that traffic control at a busy intersection may be at times difficult. There may be cases of misdirection in which the traffic officer is not negligent. But, on the other hand, the consequences which may follow from a failure in control are serious and there must be a high standard of performance if the duty is undertaken at all.

I have suggested that the misdirection may have resulted from the following of a routine which is usually satisfactory, but the inspector is controlling traffic as it is in fact, not as it usually is, and did in fact signal pedestrians across in the face of an oncoming car which he himself had directed to proceed. I think that he was negligent.

It was contended that the inspector was in a position of one giving advice and that there is no liability for wrong advice unless the liability arises out of a contract. I do not think that this describes the inspector's position at all. The argument can be put most strongly on the footing that the inspector's directions were permissive only, and that all he did was to indicate to pedestrians and motor traffic that they might proceed so far as he was concerned, but on the footing that they were still obliged to look to their own safety; the cause of the accident, therefore, was really the failure of the parties to do so.

The whole essence of traffic control is that the control is obeyed and is effective and this is the expectation of all parties concerned in it. It seems to me that permission (if the word can be properly used in this context) given in these circumstances must be given with due care lest successive permissions result in an accident. I have already stated that, in my opinion, the plaintiff and the first defendant were not entitled to rely on the direction of the inspector so that they might proceed without due care, but it is one matter to hold this and another to hold that the inspector's conduct did not contribute to this accident. In *Helson v. McKenzie's Ltd.* ([1950] N.Z.L.R. 878), Gresson, J., says: "To borrow the language of *Admiralty Commissioners v. Volute (Owners)* ([1922] 1 A.C. 129, 144), the

"two acts came so closely together that the second act was so mixed up with the state of things brought about by the first act that the party secondly negligent . . . can incoke the "prior negligence as being part of the cause of his own wrong-doing" (*ibid.*, 921). If the directions had not been given, there would have been no accident, and to hold that they were irrelevant to the accident would be unrealistic.

It follows that the accident was due to the combined negligence of the plaintiff, Hall and the inspector, and I think the major fault is with the inspector. I consider that a reasonable apportionment of responsibility is 30 per cent. to the plaintiff, 20 per cent. to Hall, and 50 per cent. to the inspector.

There remains one further matter: the liability of the defendant Corporation for the inspector's negligence.

It was contended that the Corporation was not liable because it was under no duty or directive to undertake the control of the intersection. This is probably true, but it did in fact undertake a control by its inspector and it must accept whatever consequences may flow from that.

It occurred to me after the hearing that, even if the inspector were negligent, the corporation might not be liable if he were acting in pursuance of a statutory authority reposed in himself and which he did not derive from the Council, and that on the principles explained in *Stanbury v. Exeter Corporation* ([1905] 2 K.B. 838), *Enever v. The King* ((1906) 3 C.L.R. 969), and *Fisher v. Oldham Corporation* ([1930] 2 K.B. 364) his employer was not liable. I asked counsel to submit argument in writing on this point and this judgment has been so long delayed because the submissions have only in the last few days been concluded.

I have no doubt that traffic inspectors have certain statutory authorities not derived from their employers. For example, I should doubt whether the Corporation would be liable in damages if an inspector had wrongfully exercised the power of arrest given to him under s. 44 of the Transport Act, 1944.

The power to control traffic on intersections is not anywhere clearly given in express terms. Regulation 3 (3) (a) of the Traffic Regulations, 1936, empowers a traffic inspector while carrying his warrant of appointment and wearing a uniform or cap with a badge of authority affixed thereto to stop any vehicle. Subclause (d) of the same Regulation, enables him to move or cause to be moved a vehicle which is an obstruction or whose removal is desirable. Regulation 32 requires pedestrians to obey the directions of a traffic officer for the purposes of the safe and efficient regulation of traffic. The Wellington City Consolidated By-law, 1933, Pt. II, cl. 80, provides:

"(a) He may direct (whether by signal or word of "mouth) the driver, rider or person in charge of any animal, "vehicle or locomotive on any street, private street or public "place to proceed along a certain route or in a certain direction, or not to proceed along a certain route or in a certain "direction."



Counsel for the Corporation concedes in his submission that "there appears to be no direct power to institute the form "of traffic control known as point duty" and I think that this concession is rightly made. It is true that controlled intersections are contemplated by the Traffic Regulations but that is all. The enactments quoted do not wholly comprehend the directions given by a traffic officer on point duty. This does not mean that a local authority has no right to exercise traffic control as the Wellington City Council did in this case, but it does follow that the inspector when engaged in traffic control was not exercising statutory powers personal to himself but a delegated authority from the Council to control traffic and that the Council is liable for any negligence on his part in the exercise of his duties.

The general damages claimed are excessive. There is no permanent disability and there was only a short period of incapacity. The accident was on March 6, 1952, and the plaintiff returned to work on March 17. I think that £50 is sufficient for general damages. The claim for special damages was not effectively criticised and I allow it at £51 12s. 5d.

Judgment will be for the plaintiff in the sum of £50 16s. 3d. against the first defendant, and £20 6s. 6d. against the second defendant.

Costs will be fixed by the Registrar.

*Judgment accordingly.*

Solicitors for the plaintiff: *Levi, Yaldwyn, and Gazley* (Wellington).

Solicitor for the first defendant: *City Solicitor* (Wellington).

Solicitors for the second defendant: *W. J. and R. Stacey* (Wellington).

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## KIWITEA COUNTY v. DORNBUSCH.

1953. March 3, before Mr. S. S. PRESTON, S.M., at Taihape.

*Transport—Recovery by Local Authority of Extraordinary Expenses for Road Repair—Action to be commenced by Plaintiff and Summons in Ordinary Way—Magistrates' Courts Act, 1947, s. 30—Transport Act, 1949, s. 53 (1)—Justices of the Peace Act, 1927, s. 389.*

The provisions of s. 53 (1) of the Transport Act, 1949, are not penal: they are intended to apply not only to unlawful user amounting to a public nuisance, but also to user, which though not ordinary is legitimate and reasonable, the object being to ensure that a person using a highway for unusual purposes should pay for any damage caused thereby.

Since the provisions of s. 53 are not penal, s. 389 of the Justices of the Peace Act, 1927, is not available as a method of enforcing liability for extraordinary expenses under that section.

*Watson v. Derry and Climo* ([1952] N.Z.L.R. 629; [1952] G.L.R. 447) followed.

The correct procedure is by action commenced by plaintiff and summons under the Magistrates' Courts Act, 1947, the appropriate jurisdiction being conferred by s. 30 of that statute.

PROCEEDINGS commenced by way of complaint under the Justices of the Peace Act, 1927, for recovery pursuant to s. 53 of the Transport Act, 1949, of extraordinary expenses to the extent of £107 7s. 6d. incurred by the KIWITEA County in the repair of Robb's Bridge on the Mangarere Road in the KIWITEA County.

*McInnes*, for the complainant.

*R. C. Ongley*, for the defendant.

*Cur. adv. vult.*

PRESTON, S.M. Preliminary objection is taken by counsel for the defendant to the form of the proceedings, and it is submitted that the correct procedure is by action commenced by plaintiff and summons under the Magistrates' Courts Act, 1947, and not by way of complaint under the Justices of the Peace Act, 1927.

Section 53 (1) of the Transport Act, 1949, re-enacts s. 12 (1) of the Transport Law Amendment Act, 1939, which was adopted from s. 54 (1) of the Road Traffic Act, 1930 (Gt. Brit.).

Section 12 of the Transport Law Amendment Act, 1939, was in substitution for and repealed ss. 173 and 174 of the Public Works Act, 1928. Section 173 of that Act and all previous Public Works Acts containing provisions as to extraordinary traffic provided for recovery of extraordinary expenses incurred by a local authority "in a summary manner".

Section 12 (1) of the Transport Law Amendment Act, 1939, as re-enacted by s. 53 (1) of the Transport Act, 1949, does not contain the words "in a summary manner" and, by the deletion of these words, the clear intention was to bring the practice and procedure for recovery of extraordinary expenses in line with the English practice and procedure under s. 54 of the Road Traffic Act, 1930 (Gt. Brit.).

It is to be noted that s. 54 of the Road Traffic Act, 1930 (Gt. Brit.), replaces s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898 (Eng.).

The Highways and Locomotives (Amendment) Act, 1878 (Eng.), s. 23, like the similar provisions in our Public Works Acts up to s. 173 of the Public Works Act, 1928, provided for recovery "in a summary manner".

Section 12 of the Locomotives Act, 1898, expressly varied the procedure and provided that expenses under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, shall cease to be recoverable in a summary manner but may be recovered, if not exceeding £250, in the County Court, and, if exceeding that sum, in the High Court: *The King v. Judge James and Midland Roadway Company, Ex parte Bath Rural Council* ([1908] 1 K.B. 958).

Section 54 (2) of the Road Traffic Act, 1930 (Gt. Brit.), now provides for recovery in the High Court or, if the claim does not exceed £500, in the County Court.

No special procedure is prescribed and the proceedings are, therefore, by action commenced by plaint and summons in the ordinary way and the general rules of practice and procedure apply: *8 Halsbury's Laws of England*, 2nd Ed. 501, para. 1127.

Section 53 of the Transport Act, 1949, does not state the Court which is to have jurisdiction, nor does it prescribe any special procedure. The provisions of the section are not penal: they are intended to apply not only to unlawful user amounting to a public nuisance, but also to user which, though not ordinary, is perfectly legitimate and reasonable, the object being to ensure that a person using a highway for unusual purposes should pay for any damage caused thereby: *16 Halsbury's Laws of England*, 2nd Ed. 388, para. 534.

Complainant's counsel relies on s. 389 of the Justices of the Peace Act, 1927, as authority for proceeding by way of complaint.

The provisions of s. 53 (1) not being penal, *Watson v. Derry and Climo* ([1952] N.Z.L.R. 629; [1952] G.L.R. 447) is sufficient authority for holding that s. 389 of the Justices of the Peace Act, 1927, is not available as a method of enforcing liability for extraordinary expenses under the section.

There appears to be no difficulty in determining that the correct procedure is by action commenced by plaint and summons under the Magistrates' Courts Act, 1947.

The requisite jurisdiction is vested in the Magistrates' Court by s. 30 of the Magistrates' Courts Act, 1947.

The proceedings should be brought by ordinary action commenced by plaint as prescribed by rr. 70, 71, 72 and 74 of the Magistrates' Court Rules, 1948.

Section 389 of the Justices of the Peace Act, 1927, not being available to the complainant, the complaint is therefore dismissed.

Complainant is ordered to pay defendant's costs, £3 3s. 0d.

*Complaint dismissed.*

Solicitors for the complainant: *Haggitt, Elliott, and Fawcett* (Feilding).

Solicitors for the defendant: *R. C. Ongley* (Taihape).

### ECROYD v. MINISTER OF LANDS.

1953. February 6, 19. Land Subdivision in Counties Appeal Board, Auckland. Mr. H. JENNER WILY, S.M., Chairman, and Messrs. G. M. R. JACKSON and P. HARRISON, Members.

*Land Subdivision in Counties—Town-planning—Owner's Scheme Plan of Subdivision into Building Sections—Minister's Refusal to approve Such Plan on Ground of "public interest"—Such Refusal based principally on Existence of County's Extra-urban Planning Scheme provisionally approved by Town-planning Board—Such Plan not "an approved town-planning or extra-urban planning scheme", and Inapplicable to Owner's Application—Minister's Refusal invalid accordingly—"Approved"—Appeal Board—Nature and Extent of Jurisdiction—Owner's Appeal as "Owner" and not as "Occupier"—Land Subdivision in Counties Act, 1946, ss. 3 (4), (5) (a), (7), 4—Town-planning Act, 1926, ss. 17, 21.*

The appellant, the owner of land in the Manukau County which he desired to sub-divide, submitted his scheme plan of subdivision to the Minister of Lands for his approval under s. 3 (1) of the Land Subdivision in Counties Act, 1946. The Minister refused his approval in terms of s. 3 (5) (a) of that statute, on the ground of "public interest" as the land was within the area comprised in the Manukau County's extra-urban planning scheme to which provisional approval had been given by the Town-planning Board under s. 17 of the Town-planning Act, 1926, and as there was in existence an Outline Development Plan for the Auckland Metropolitan District and its environs, whereby a scheme of urban and extra-urban planning under the Town-planning Act, 1926, was in course of preparation by the responsible local authorities including the Manukau County. This Plan had not been even provisionally approved.

On appeal under s. 3 (7) of the Land Subdivision in Counties Act, 1946, against the refusal of the Minister of Lands to approve the appellant's scheme plan of subdivision,

*Held*, 1. That the existence of an Outline Development Plan for the Auckland Metropolitan District could not be raised by the Minister of Lands as a matter of public interest under s. 3 (5) (a) of the Land Subdivision in Counties Act, 1946, as a ground for refusal to consent to the appellant's subdivisional scheme plan.

*Patton v. Minister of Lands* ((1951) 7 M.C.D. 444) followed.

2. That there is no restriction on the Board of Appeal established under s. 3 (7) of the Land Subdivision in Counties Act, 1946, to review the decision of the Minister of Lands under s. 3 (4) of that statute, if, in the Board's opinion, such decision is shown as not being in conformity with the law or with the facts relating to the particular application, the onus being on the appellant to satisfy the Board that the Minister was wrong in his refusal on the grounds on which he has based that refusal; and it is unnecessary for the appellant to prove whether or not the Minister has acted *mala fides*.

3. That the word "approved", as used in s. 4 of the Land Subdivision in Counties Act, 1946, applies only to a scheme prepared and completed to final approval and seal by the Town-planning Board in accordance with s. 21 of the Town-planning Act, 1926; and that, accordingly, s. 4 of the Subdivision in Counties Act, 1946, did not apply to the appellant's application.

4. That the appellant was not prevented from exercising his right of appeal as an "owner" against the Minister's refusal under s. 3 (7) of the Land Subdivision in Counties Act, 1946, by reason of his having objected to the Manukau County's extra-urban planning scheme provisionally approved under s. 17 of the Town-planning Act, 1926, since he had so objected in his capacity as an "occupier".

APPEAL under s. 3 (7) of the Land Subdivision in Counties Act, 1946, against the refusal of the Minister of Lands to approve a scheme plan of subdivision of land under that Act.

The land comprised on the plan contained fifty-seven acres and three-tenths of a perch being part of Allotment 73 of the Parish of Pakuranga and being the whole of the land in certificate of title Volume S13 Folio 148. It had a frontage on the south-east side to Botany Road which was a formed metalled road and a frontage on the north-west side to a dedicated but unformed road called Bradbury Road. The whole of the land was situated in the Manukau County and the nearer north-west corner was about a quarter of a mile from the boundary of the Howick Borough at a point where the concrete main highway entered the Borough. The scheme plan showed a subdivision of seven approximate quarter-acre sections on Botany Road with access to three further internal areas of approximately six, seven, and eight acres. A further twenty-five approximate quarter-acre sections faced Bradbury Road with access also reserved to four internal

areas from approximately five and three-quarter acres to seven acres in area.

In June, 1952, the scheme plan was submitted to the Minister for approval. By letter dated July 1, 1952, the Minister refused to approve of the subdivision. The material part of the Minister's letter is as follows:

"The Surveyor-General has now advised that the Minister 'has refused approval to this scheme plan in terms of Section 3 (5) (a) of the Act, i.e., 'Public Interest'. It is considered that refusal is justified, as the whole question of zoning is now in the process of determination under the Town-planning Act, provisional approval to the Manukau County Council's extra-urban plan having been given by the Town Planning Board."

In evidence adduced on behalf of the appellant it was shown that this land was well sited for subdivision, being about a quarter of a mile from the junction of the Howick Borough boundary and the concrete main highway to Auckland. At this junction was a large new public school and a store. Between the north-western corner of the land and the main highway and immediately adjacent to this land was a subdivision of eleven quarter-acre sections, made in 1936, and on which many of the better type of dwellings had been erected. Agreement had been reached between the appellant and the local body as to the formation of Bradbury Road. No public services were provided by the local authority to the residents in Bradbury Road. The sections of this subdivision facing Bradbury Road were high with an excellent view of parts of Auckland and the harbour and surrounding country. The composition of the soil was suitable for septic drainage and the sections had a good fall from the road. The sections facing Botany Road were lower lying and had not the view of the upper sections. There was a proved demand for the sections if they became available for sale.

*Wheaton*, for the appellant.

*Rosen*, for the respondent.

*Cur. adv. vult.*

The judgment of the Board was delivered by

WILY, S.M. The appellant raised many issues in his case on appeal dealing with subjects relevant to general matters of public interest and led evidence in support thereof. It is clear, however, from the refusal of the Minister as contained in the above part-cited letter that the public interest, that is the basis of his refusal, is that the whole question of zoning is now in the process of determination under the Town-planning Act, 1926, and that Manukau County in particular has now a provisionally approved extra-urban plan under that Act. For the respondent, evidence in relation to this narrower issue only was led. It would appear from the conduct of the case on behalf of the respondent that the refusal was based solely on two issues, namely, the existence of an Outline Development

Plan for the Auckland Metropolitan District and also the provisional approval of the extra-urban plan of the Manukau County Council.

If refusal is based first on the existence of this Outline Development Plan, then the facts adduced in support thereof both as to the details of the plan and its purpose and the particulars of the land and its locality are almost identical with those referred to in *Patton v. Minister of Lands* ((1951) 7 M.C.D. 444, 448) and there is no need to reiterate those facts here. The land in this appeal is, however, nearer to a growing Borough and is at its nearest point about a quarter of a mile from a main highway and a large new public school. There are also eleven quarter-acre sections, almost all built on, immediately adjacent to it. A yellow belt in the Outline Development Plan allowing a subdivision into two-acre blocks lies between this land and the Howick Borough Boundary and includes a small triangular part of the north-west corner of this land. The balance is in the green belt which allows subdivision into five-acre lots. This small variation in the facts does not affect the principles enunciated in *Patton's* case. This Board agrees with the conclusions reached by the Board in *Patton's* case. This Outline Development Plan is such that it cannot be raised as a matter of public interest to the extent that it enables the Minister, exercising his authority under the Land Subdivision in Counties Act, 1946, to deprive an owner of his beneficial interest in fee simple on the plea that this proposed subdivision conflicts with such embryo plan. There is power under s. 23 of the Town-planning Act, 1926, for any two or more local bodies in adjoining districts to unite and prepare a combined extra-urban planning scheme. Although there is evidence by Mr. Jones of the existence of some Metropolitan Planning Organization comprising, he estimated, twenty-one or twenty-two local bodies, there was no evidence before this Board as to whether or not there is a committee properly constituted under s. 28, or whether any of the other requirements of that section have been complied with. It does seem clear, however, that no extra-urban planning scheme has been submitted to, or provisionally approved by, the Town-planning Board. This apparently should, under the Act, have been completed first by 1930, later extended to 1932, and again to 1937 and lying dormant since then. Some twenty-six years have passed since this power was given under the Act, and there is no evidence before this Board that any such combined extra-urban planning scheme is any nearer towards coming into existence or even that the requisite Committee is as yet established. For the above reason and for the reasons and on the authorities as enunciated in *Patton's* case, this Board determines that this Outline Development Scheme cannot be raised by the Minister as a matter of public interest under s. 3 (5) (a) of the Land Subdivision in Counties Act, 1946, on which he relies.

The second issue relating to the effect of the extra-urban planning scheme of the Manukau County, which was provisionally approved by the Town-planning Board on March 11, 1952, is, however, new since *Patton's* case was determined.

For the respondent, it is submitted that the provisional approval of such a scheme now binds the Minister under s. 4 of the Land Subdivision in Counties Act, 1946. The section is as follows:—

“Notwithstanding anything in this Act or in any regulations made pursuant to section nineteen of this Act, where there is an approved town-planning or extra-urban planning scheme under the Town-planning Act, 1926, affecting any locality, no scheme plan of land in that locality shall be approved or varied under this Act, nor shall any conditions be imposed or varied, if the scheme plan or the conditions, or any variations thereof, are inconsistent with the approved town-planning or extra-urban planning scheme.”

Mr. *Rosen* submitted that the words “approved . . . extra-urban planning scheme” must be read so as to include a provisionally approved scheme, and that accordingly the Minister is bound under this section to refuse his approval of any scheme which is inconsistent with such provisionally approved scheme as this proposed subdivision is admitted to be. As an alternative defence Mr. *Rosen* submitted that the exercise of his authority by the Minister under s. 3 of the Land Subdivision in Counties Act, 1946, is an administrative or executive act and, as such, cannot be interfered with on appeal unless it is shown that such exercise was not *bona fide*. In support of this latter submission he submits a number of English authorities but, in each of those cases, the objection to the Minister's administrative act was taken by way of originating summons and the administrative act was exercised under a statute which gave no right of appeal. These authorities are not, therefore, in point. The Land Subdivision in Counties Act, 1946, by s. 3 (7) gives any person aggrieved by the refusal of the Minister under that section to approve of a scheme, a right of appeal to a special Board of Appeal established under subs. (7). There appears to be no restriction on such Board of Appeal to review the decision of the Minister if, in its opinion, such decision is shown not to be in conformity with the law or with the facts relating to the particular application. This Board, therefore, proposes to deal with this Appeal on the basis of the law applicable under the two relevant Acts referred to above and on the facts as proved before it. It is not necessary to prove whether or not the Minister has acted *mala fides*. It is necessary for the appellant to satisfy this Board that the Minister was wrong in his refusal on the ground on which he has based that refusal.

It remains therefore to deal with the final submission that “approved” in s. 4 of the Land Subdivision in Counties Act, 1946, may be read to mean “provisionally approved”. Counsel for the respondent suggests that, unless this interpretation is given to this word in this section, the whole scheme of the Town-planning Act, 1926, would be upset and no other interpretation would allow the Act to work smoothly. This Board, however, is not concerned with the smooth working of the Town-planning Act, 1926, nor whether the principles underlying that Act are endangered in its interpretation under this



Appeal. It may well be that the local authorities concerned are themselves responsible for any dangers that may have arisen in carrying out the principles of the Town-planning Act by reason of the unexplained delay by them of over twenty years in bringing their schemes to completion particularly in a period of such rapid development. The Act takes away certain private rights affecting the ownership of real property, and these rights cannot be taken away except by words in a statute which are clear and unambiguous even though such an interpretation may defeat or delay the purport of the Act. That is a matter that can be cured only by legislation and it is not open to this Board or to any Court to endeavour to cure a defect, if such defect exists, by a less rigid interpretation than the clear unambiguous meaning of the statutory provision. This is made clear in *Craies on Statute Law*, 3rd Ed. 109, in which reference is made to *In re Cruno* ((1889) 43 Ch. D. 12) where the judgment of Bowen, L.J., is quoted as follows: "In the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature" (*ibid.*, 17). The text of this work then continues:

"Therefore rights, whether public or private, are not to be taken away, or even hampered, by mere implication from the language used in a statute, unless as *Fry, J.*, said in *Corporation of Yarmouth v. Simmons* ((1878) 10 Ch. D. 518, 527), 'the Legislature clearly and distinctly authorize the doing of a thing which is physically inconsistent with the continuance of an existing right.'"

Thus, in interpreting s. 4, if the word "approved" has any clear and unambiguous meaning, then it must be given that meaning and cannot be given any other or wider interpretation to assist in the better carrying to completion the purposes of the Act to which it relates. If the use of the word creates any ambiguity, then such ambiguity must be given the narrower interpretation if that interpretation will preserve the existing rights of ownership that were in being at the time the Act comes into force.

An examination of the Town-planning Act, 1926, shows that the words "approved", "conditionally approved", and "finally approved" (with variations as to tense) are used in many parts of the context. Thus, we have the word "approved" used in s. 23 relating to variations of an approved scheme and in s. 30 relating to betterment arising from the approval of a scheme. It is used again in s. 77 (1) of the Statutes Amendment Act, 1941, where further powers are given to the local authority in relation to the approved scheme. It is to be noticed, however, that, where wider powers are given under s. 34, the words used are "before the scheme has been approved by the Board". The word "approved" is then used in s. 7 (1) of the Town-planning Amendment Act, 1948, in a context which would appear to apply to the failure to submit a scheme which has not been carried through to completion under the Act. The scheme under the Act is not complete until, under s. 21,

the Board shall "finally approve" of the scheme and signify its "approval" by affixing thereto its seal. This "finally approved" is referred to in ss. 22 and 27 of the principal Act but more significantly offences under the Act were created by s. 76 (1) of the Statutes Amendment Act, 1941, against any person who fails to comply with a scheme that "has been finally approved by the Board", i.e., a scheme that has been finally approved under s. 21 of the principal Act by the affixation of the seal of the Board. The words "finally approved" have also a similar meaning where used in ss. 7 (3) and 8 (1) of the Town-planning Amendment Act, 1948. The words "provisionally approved" appear in s. 17, where they obviously apply to a scheme in course of preparation and they appear again in the words "provisional and final approval" under s. 35 in a context where each must have its individual application. The word "approved" is, however, used with yet a further interpretation under s. 16 of the principal Act in which it provides that a scheme—after having been "provisionally approved" by resolution of the Council—shall be "submitted for approval to the Town-planning Board".

Thus there is a provisional approval by a Council, followed by a provisional and later a final approval by the Board. An application of the word "approve" is thus used in many sections of the Act, but in most cases is preceded by its qualifying adjective. Where there is no such qualification the context of the section makes it clear in its meaning and application. It is clear, however, from the context and purpose of the whole Act that the object of the Act is the preparation and completion of a scheme that is finally approved by the fixation of the seal of the Board. Except where powers are specially reserved under s. 34 pending the completion of a scheme the rights, liabilities, and penalties follow a finally approved scheme. The Act itself is clear as to what is meant as an approved scheme under that Act. Where there is any other interpretation, this is also made clear in the relevant text. There would seem, therefore, to be no ambiguity or doubt that where reference is made in another Act to "an approved town-planning or extra-urban planning scheme", as in s. 4 of the Land Subdivision in Counties Act, 1946, this can apply only to a scheme prepared and completed to final approval and seal by the Town-planning Board in accordance with s. 21 of the Town-planning Act. The scheme for the Manukau County Council has not reached that stage and the above-mentioned s. 4 does not therefore apply to this application.

Counsel for the respondent raised one further issue. He submitted that the appellant was given his right of objection to the provisionally approved scheme under s. 17 of the Town-planning Act, 1926, and that, as he had exercised that right, he therefore had no right of appeal under this Act. This submission is not tenable. Any person aggrieved is given his right of appeal under the Land Subdivision in Counties Act, 1946, which is itself subject to certain restrictions in relation to the Town-planning Act. As an aggrieved "owner", the appellant has so appealed. His right of objection, however,

under s. 17 is only as an "occupier" and not as an "owner". An occupier's interest may vary greatly from that of an "owner", and could possibly apply mainly to the internal or immediate use of the land. Counsel for the respondent submits that the word "occupier" in this section which is not defined must be given its widest interpretation to include an owner. This, however, does not appear to be the intention of the legislature as the point is clarified by s. 77 (3) of the Statutes Amendment Act, 1941, under which, where there is any variation of an approved scheme every "owner or occupier" is given a right of objection. We have been informed by counsel that the Town-planning Board has granted this appellant for the hearing of his objection under that Act the period of one quarter of an hour. If that is correct, then that may be sufficient time to hear his objection for the limited interests of an occupier, but would be a totally inadequate period for the hearing of his objection as an owner.

The Board of Appeal will, therefore, allow this appeal with costs to the appellant. As there are certain outstanding matters as to roads, footpaths, reserves, drainage easements and the chamfering of the frontage to Lot 9 to be finalised, the Board will require these to be settled before a final order on the appeal is made. It is understood that an agreement has been reached in these matters but the Board will hear counsel, if necessary, as to the form of the order to be made on this appeal. Counsel may also be heard as to the quantum of costs and witnesses' expenses.

*Appeal allowed.*

Solicitors for the appellant: *Bamford, Brown, and Wheaton* (Auckland).

Solicitors for the respondent: *Meredith, Meredith, Kerr, and Cleal* (Auckland).

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WILSON v. NEW ZEALAND EXPRESS COMPANY,  
LIMITED.

1952. October 20. 1953, March 9, before Mr. W. S. SPENCE,  
S.M., at Auckland.

*Transport—Construction of Statute—“Certificate of fitness as hereinafter provided”—No Specific Later Reference in Statute—Legislative Intent—Wide and Comprehensive Language with No Technical Meaning—Reference to Regulation-making Power in Later Section—Transport Act, 1949, ss. 118, 160 (m).*

The words, “a certificate of fitness as hereinafter provided,” as used in s. 118 of the Transport Act, 1949, must be given the fullest meaning to effectuate the clear intention of the Legislature, and there is sufficient in s. 100 (m) of the statute (to which the Transport Regulations, 1950, owe their validity in respect of the issue, duration, conditions, etc., of certificates of fitness) to prevent those words from becoming meaningless.

Dictum of Lord Greene, M.R., in *Elderton v. United Kingdom Totalisator Co., Ltd.* ([1945] 2 All E.R. 624, 625) applied.

INFORMATION charging the defendant under s. 118 of the Transport Act, 1949, with using a goods service vehicle being a heavy vehicle for which no certificate of fitness was in force.

The vehicle, when stopped, was carrying a load of furniture in the course of defendant's business and had a gross weight of 2 tons 14 cwt. A warrant of fitness was current but no certificate of fitness.

*Hopwood*, for the Department.

*Jenkins*, for the defendant.

*Cur. adv. vult.*

SPENCE, S.M. On the evidence, I have no doubt that, in the circumstances, the vehicle came within s. 118 and that its use was prohibited unless a certificate of fitness had been obtained and was in force.

Mr. *Jenkins* relied in his defence on the terms of s. 118 itself. He contended that the words of the section “a certificate of fitness as hereinafter provided” limited the requirement as to such a certificate to what was embodied in the Act itself. In other words, he contended that, starting with s. 118, all the provisions relative to certificates of fitness should be embodied in the Act itself. He pointed to s. 117 which provides for certificates for passenger vehicles where the provision corresponding to that now under consideration is “a certificate of fitness . . . in accordance with regulations made under “this Act . . . .”

The Act itself is silent on the method of obtaining such certificate, their form and the requirements therefore generally.

The Transport Licensing Regulations, 1950 (Serial No. 1950/28), prescribe the machinery matters and owe their validity to s. 160 of the statute.

The phraseology of s. 118 is unfortunate. The use of the word "hereinafter" is apt to lead to difficulties in interpretation, and, in view of the learned author of the appropriate sections of *31 Halsburys Laws of England*, 2nd Ed. 572, is best avoided. There is no apparent reason why the terms used in s. 117 should not have been used also in s. 118 when no question could arise.

No authority was cited in the argument, Mr. *Jenkins* relying simply on the effect of the applications to the words of their ordinary meaning. After consideration, I have come to the conclusion that, though the draughtsmanship of s. 118 is inept, an offence still lies.

It may be taken without question that Parliament thought fit to regulate and supervise the condition of vehicles such as that involved in the present case and that the matters of detail and machinery were to be set out in Regulations. Section 160 empowers the making of such Regulations and para. (m) includes among the subjects on which Regulations may be enacted the following: ". . . providing for and regulating "the issue, duration, conditions and revocation of certificates "of fitness and permits for such vehicles . . ."

It is true that a penal statute must be strictly construed, but that rule is subject to the principle that the sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and object of the Legislature is to be adopted. *Maxwell on the Interpretation of Statutes*, 8th Ed. 241, says: "The paramount object, in construing penal "as well as other statutes, is to ascertain the legislative intent, "and the rule of strict construction is not violated by permitting "the words to have their full meaning, or the more extensive "of their meanings, when best effecting the intention." The remarks of *Lord Greene, M.R.*, near the commencement of his judgment in *Elderton v. United Kingdom Totalisator Co. Ltd.* ([1945] 2 All E.R. 624, 625) are an example of the application of this rule.

In the present case, the words "hereinafter provided" must, I think, be given the fullest meaning to effectuate the clear intention of Parliament and, when that is done, there is sufficient in s. 160 (m) to prevent the quoted phrase from becoming meaningless.

I find, therefore, that the defendant has committed an offence and will be convicted accordingly. Convicted and ordered to pay costs.

*Defendant convicted.*

Solicitors for the defendant: *Jenkins and Winter* (Auckland).

Solicitor for the informant: *Transport Department* (Auckland).

## ANDREW v. MINISTER OF LANDS.

1953. February 10, April 2. Land Subdivision in Counties Appeal Board, Mr. J. W. KEALY, S.M., Chairman, at Otahuhu.

*Land Subdivision in Counties—Appeal—Minister's refusal of Consent to Scheme-Plan of Subdivision—Grounds for Refusal that Town-planning Board alone could deal with Objection to County's Provisionally Approved Extra-urban Plan—Refusal not justified on Any Ground set out in Land Subdivision in Counties Act, 1946—Land Subdivision in Counties Act, 1946, s. 3 (5) (7).*

The appellant's land, containing a little less than 6½ acres, was situated in the Manukau County. It adjoined the boundary-line of Howick Borough, and immediately adjoined another small block, already subdivided, within that borough. The appellant's scheme-plan showed a proposed subdivision into quarter-acre lots, without involving any road formation.

The scheme-plan was submitted to the Minister for approval on November 20, 1951, and approval was formally refused by letter dated November 14, 1952, the ground of such refusal being stated as follows:—

“Refusal is made under s. 3 (5) (a) of the Land Subdivision in Counties Act, 1946, on the grounds that “the Extra-urban Plan of the Manukau County Council “was provisionally approved by the Town-planning Board “on March 11 last, and that as a consequence, objections “to the Extra-urban Plan may be dealt with only by the “Town-planning Board under the judicial powers vested “in it by the Town-planning Act, 1926. Therefore the “Minister will not approve any plan that contravenes “the zoning in the Extra-urban Plan until such matters “have been determined by the Town-planning Board.”

The appellant appealed under s. 3 (7) of the Land Subdivision in Counties Act, 1946, against the Minister's refusal.

*Held*, allowed the appeal, 1. That, when the Minister of Lands has refused his consent to a subdivision, it is the duty of the Board of Appeal set up under s. 3 (7) to review the grounds upon which the Minister relied as justifying his refusal; and, after a *prima facie* case has been made out by the appellant, the Minister, in order to succeed, must satisfy the Board, on the evidence, that his refusal is justified on at least one of the grounds set out in s. 3 (5).

*Ecroyd v. Minister of Lands* (Ante, p. 67) followed.

2. That the ground upon which the Minister relied was not one of the grounds set out in s. 3 (5).

*Semble*, That the rights and remedies given to the various parties by s. 3 of the Land Subdivision in Counties Act, 1946, are additional to those created under the Town-

planning Act, 1926, and there is no conflict of jurisdiction between that section and certain sections of the Town-planning Act, 1926.

Dicta thereon in *Patton v. Minister of Lands* ((1951) 7 M.C.D. 444) disagreed with..

APPEAL under s. 3 (7) of the Land Subdivision in Counties Act, 1946, against the refusal of the Minister of Lands to approve a scheme-plan of subdivision of land under that Act.

The land concerned was a small block containing just under 6½ acres. It was situated in the Manukau County, and adjoined the boundary line of Howick Borough.. It also immediately adjoined another small block of land previously owned by the applicant and situated within the Borough of Howick, which latter piece had already been subdivided. The subdivision proposed (into lots of ¼-acre and upwards) would not have involved any new road formation.

The scheme plan was submitted to the Minister for approval on November 20, 1951, and approval was formally refused by letter dated November 14, 1952, the ground of such refusal being stated as follows:

"Refusal is made under s. 3 (5) (a) of the Land Sub-division in Counties Act, 1946, on the grounds that the "Extra-urban Plan of the Manukau County Council was provisionally approved by the Town-planning Board on 11th March last, and that as a consequence, objections to the "Extra-urban Plan may be dealt with only by the Town-planning Board under the judicial powers vested in it by "the Town-planning Act, 1926. Therefore the Minister will "not approve any plan that contravenes the zoning in the "Extra-urban Plan until such matters have been determined "by the Town-planning Board."

*Chilwell*, for the appellant.

*Rosen*, for the defendant.

*Cur. adv. vult.*

The judgment of the Board was delivered by

KEALY, S.M., Chairman. Section 3 (5) of the Land Sub-division in Counties Act, 1946, reads as follows:—

"Without prejudice to the generality of the last preceding subsection, the Minister may refuse to approve any "scheme plan—

"(a) If in his opinion closer subdivision or settlement "of the land shown on the scheme plan is not in "the public interest or the land for any other "reason whatsoever is not suitable for sub-division:

"(b) If in his opinion adequate provision has not been "made for the drainage of any allotment or the "disposal of sewage therefrom:

"(c) If the subdivision would in his opinion interfere "with or render more difficult or costly the

"carrying-out of any public work or scheme of development which is proposed or contemplated by the Minister of Works or any other Minister of the Crown or by any local authority:

"(d) If in his opinion the proposed subdivision does not conform to recognized principles of town-planning."

Considerable evidence was tendered at the hearing, and, without attempting to review this evidence in detail, all members of this Board are satisfied that, in so far as the merits of the case are concerned, it has not been shown either that the land in question is not suitable for subdivision or that its closer subdivision will be against the public interest.

Under s. 3 of the Land Subdivision in Counties Act, 1946, the Minister is given wide powers. He may, until a "finally approved planning scheme (i.e., an approved scheme within the meaning given to that expression by the decision in *Ecroyd's* case hereinafter referred to) is in existence—at which time s. 4 comes into operation—rely upon any of the grounds set out in paras. (a) (b) (c) or (d) of subs. 5 of s. 3 in refusing to give his approval to a scheme plan of subdivision.

If, however, his action in so refusing his consent be challenged on appeal, it is the duty of the Board set up under subs. 7 to review the grounds upon which he relies as justifying his refusal. It is not sufficient (until a finally approved planning scheme has come into existence, when different considerations apply) for the Minister merely to say, "I refuse consent because this scheme of subdivision contravenes an extra-urban planning scheme." He must, on the contrary, satisfy the Board, on the evidence, that his refusal is justified on at least one of the grounds laid down in subs. 5. Unless (after a *prima facie* case has been made out by an objector) the Minister is prepared to do that, his case must fail. To hold otherwise would be to render the right of appeal given by subs. 7, for all practical purposes, valueless.

Mr. *Rosen* has advanced legal argument designed to show that, in the circumstances of the present case, the Board is not entitled to review or question the Minister's decision.

It is considered unnecessary to review the various technical contentions he put forward, for they exactly parallel those advanced in a similar appeal (that in *Ecroyd's* subdivision) which was heard on February 6 and 11 last: *Ecroyd v. Minister of Lands* (*Ante*, p. 67). The decision in that case was reserved on February 11, but has now been given, and the members of the present Board have had the opportunity of perusing it. With that decision, which was delivered by *Jenner Wily, S.M.*, on February 19, the members of this present Board respectfully agree, and, therefore, find themselves unable to concur with the arguments put forward by Mr. *Rosen*.

The decision in *Patton v. Minister of Lands* ((1951) 7 M.C.D. 444) was cited in argument, Mr. *Rosen* contending that that case was wrongly decided, and should not be followed. This Board, however, finds itself in agreement with the decision



in question except as regards certain dicta, non-essential to the conclusion reached, which suggest that there is a clash of jurisdiction between certain sections of the Town-planning Act, 1926, and s. 3 of the Land Subdivision in Counties Act, 1946. The rights and remedies given to the various parties by s. 3 of the Land Subdivision in Counties Act, 1946, are, in the opinion of this Board, rights and remedies additional to those created under the Town-planning Act, 1926.

This appeal will be allowed, with costs to the applicant. As in *Ecroyd's* case, and for the reasons there stated, the Board will, if necessary, hear counsel as to the form of order, and as to the question of costs and witnesses' expenses.

*Appeal allowed.*

Solicitors for the appellant: *Haddow, Haddow, and Chihwell* (Auckland).

Solicitors for the respondent: *Meredith, Meredith, Kerr, and Cleal* (Auckland).

### MUNRO v. WHANGAREI COUNTY.

1953. March 3, 30, before Mr. J. R. HERD, S.M., at Whangarei.

*Land Drainage — Obstructions — Local Authority ordering Removal of Obstructions — Scope of Order — Statutory Obligation to comply with Valid Order—Contrast with Application to Adjoining Owner to improve Natural Flow of Water—Land Drainage Act, 1908, ss. 62, 67.*

Section 62 of the Land Drainage Act, 1908, contemplates an order by a local authority for removal of obstructions and clearing and cleansing by removal of weeds and growths calculated to impede the full flow of water, as contrasted with an improvement to the natural flow of water by work such as is described in s. 67 (1) as widening, deepening, straightening, or otherwise improving.

*James v. Kowai County Council* ((1922) 17 M.C.R. 76) and *Raglan County Council v. Covert* ((1928) 23 M.C.R. 35) distinguished.

Section 62 of the Land Drainage Act, 1908, imposes a statutory obligation upon every occupier or owner of land on the banks of any watercourse or drain to remove obstructions (including weeds) which impede the "free flow of the water in such watercourse or drain," if he is required to do so by a proper order made by the local authority; and failure renders the occupier or owner liable for fine and payment of the expenses of having the removal effected by the local authority. His redress is to appeal to a Magistrate to determine that the notice shall have no effect, and he may so appeal, if he considers he can show justification for it, even after a determination of a Magistrate requiring compliance with the order.

COMPLAINT calling on the Whangarei County Council to show cause why it should not comply with a notice given by the complainant under s. 63 of the Land Drainage Act, 1908, to the Council requiring it to order Susan Elsie Storrar to remove obstructions, including weeds, growth, and other refuse, from the land owned and occupied by her adjoining his land near Hikurangi.

The Council, being of the opinion that the matter concerned only the adjoining owners, although sympathetic to complainant, declined to make the order and suggested to complainant that he proceed under Part IV of the Act which makes provisions for settlement of matters between adjoining owners arising out of improvements of drains.

*Gerard*, for the complainant.

*L. A. Johnson*, for the respondent.

*Cur. adv. vult.*

HERD, S.M. As between the complainant and the Council there is little dispute, if any, as to the facts (but Mrs. Storrar has not yet been heard because, as yet, she has no status in these proceedings). From the evidence, it appears that the drain complained of is a watercourse which normally provides for a flow of surface water through complainant's land and other upper lands down through Mrs. Storrar's land. On Mrs. Storrar's land, it is alleged this drain is blocked by sunken wood from old bridges, fallen tea tree and weeds, so that water stands in it 4 feet higher than it should, backs up on to, and damages, complainant's permanent pasture.

Complainant's farm is being farmed to a comparatively high degree of productivity, whereas Mrs. Storrar's has been neglected and would now yield only a very low production.

This fact, of poor yield on Mrs. Storrar's farm, causes the Council to reason that the removal of the obstructions would be of greater benefit to complainant on account of his greater productivity than to Mrs. Storrar. It appears, however, that at least some benefit would accrue to Mrs. Storrar by way of increased value and increased chance of sale if the blocked drain is cleared.

Counsel for the Whangarei County Council refers me to two cases both decided by Mr. *Wyvern Wilson*, S.M., namely: *James v. Kowai County Council* ((1922) 17 M.C.R. 76) and *Raglan County Council v. Covert* ((1928) 23 M.C.R. 35) in which the learned Magistrate held that the circumstances therein warranted procedure under Part IV of the Act for apportionment as between adjoining owners.

In the first of these cases, the cleaning of the drain would be rather a detriment than a benefit to the person required to clear though of considerable benefit to other owners and to the local Council.

In the second case, where the stream was along the boundary between two disputing owners, one of whom was the son of the Chairman of the County Council, the learned Magistrate found that the notice had not been given in good faith, and

further that the cheapest and most efficacious way of dealing with the matter was by "a straight cut through approximately 'the boundaries.'"

These last circumstances, to my mind, clearly distinguish the instant case from *Covert's* case above because the obstruction lay between two disputing owners not solely on the property of one. So it was, on the face of it, unfair to require one only to do the clearing. Further, the most expeditious way in that case, the straight cut would be an improvement as contemplated by s. 67 (as amended by s. 17 of the Land Drainage Amendment Act, 1922) in Part IV, which reads:

"67. (1) Any person having any interest in land who  
"desires to prevent the overflow of water thereon, or to  
"drain the same, and in order thereto deems it necessary  
"that new drains should be opened through or between  
"lands belonging to another owner or owners, or that existing  
"drains in or between lands belonging to another owner or  
"owners should be cleansed, widened, deepened, straightened,  
"or otherwise improved, may apply in writing under his  
"hand to such owner or owners (hereinafter included in  
"the expression 'adjoining owner') for leave to make such  
"drains or improvements in drains through, on, or between  
"the lands of the adjoining owner.

"(2) Such application shall be served on the adjoining  
"owner, and also on the occupier if the owner is not the  
"occupier, or, if there is no occupier and the owner is absent  
"from New Zealand, on the owner's agent in New Zealand,  
"or, if there is no such agent, or the owner is unknown, shall  
"be posted on some conspicuous place on the land to be  
"affected by such application.

"(3) The application shall state the nature of the drains  
"or improvements in drains proposed to be made, and shall  
"be accompanied by reference to a plan deposited at some  
"public office in the district, on which the length, width, and  
"depth of the proposed drains or improvements in drains  
"shall be delineated, and shall further state the compensation  
"(if any) which the applicant proposes to pay [and the  
"value of any benefit which in the opinion of the applicant  
"will accrue to the land of the adjoining owner by reason  
"of the proposed works]."

This and the succeeding sections clearly suggest compensation to an adjoining owner.

I think also the first case can be distinguished because the fact of detriment rather than of benefit from the works would more clearly indicate that compensation would be justly payable to the owner required to do the work.

I feel free to decide which procedure the Legislature contemplated for circumstances such as these.

Clearly, the procedure under ss. 62 and 63 does not contemplate any compensation to the person required to clear the obstruction or any contribution by the person entitled to require an order for its removal. Section 62 (as amended by s. 7 of the Land Drainage Amendment Act, 1913) reads:

"(1) Where there is any watercourse or drain within or "beyond the district of a local authority, and its obstruction, "in the opinion of the local authority, is likely to cause "damage to any property in such district, the local authority "may order the occupier (or, if there is no occupier, the "owner) of any land on the banks of such watercourse or "drain within the district or within one mile beyond the "boundary of the district to remove from such watercourse "or drain, and from the banks of such watercourse or "drain to a distance not exceeding ten feet from the nearest "margin of the watercourse or drain, all obstructions of "any kind calculated to impede the free flow of water in "such watercourse or drain."

"(1A) For all the purposes of this section—

"(a) 'Obstructions' includes earth, stone, timber, "and material of all kinds, and trees, plants, "weeds, and growths of all kinds.

"(b) The occupier or owner of land adjoining a "road shall be deemed to be the occupier or "owner of land on the banks of any water- "course or drain running upon such road "where such road fronts the land of such "occupier or owner, unless such watercourse "or drain has been artificially constructed by "the local authority for the purpose only of "draining the surface of such road.

"(2) Every occupier or owner who fails to comply with "such order within fourteen days from the receipt thereof "is liable to a fine not exceeding one pound for every day "during which such order is not obeyed, and a further sum "equal to the cost incurred by the local authority in "removing any such obstruction; and the said cost shall be "a charge on the land, and may be recovered as rates are "recovered under any Act for the time being in force in "the district:

"Provided that any such occupier or owner may appeal "to a Magistrate against such order within ten days after "the service thereof, and such Magistrate shall have juris- "diction to determine whether such order shall have effect, "having regard to all the circumstances of the case, and "pending the determination of such appeal the order shall "be suspended.

"(3) The local authority for the purpose of removing "any obstruction from a watercourse or drain, either within "or beyond the limits of the district of its jurisdiction, shall "by its servants have the free right of ingress, egress, and "regress on any land on the banks of any such watercourse "or through which any such drain runs."

There will, therefore, be a right of appeal after the Council in this case complies with the complainant's notice and makes any order which may now be required of it.

By s. 63 (b) I have jurisdiction to determine:—

(i) Whether the notice should be complied with by the Council and, if so,

(ii) to what extent it should be complied with.

A comparison between the circumstances contemplated by s. 62 and those contemplated by s. 67 (in Part IV) reveals both a similarity and differences, but, in general, I would say that s. 67 contemplates "improvements" whereas s. 62 contemplates "removal of obstructions".

The only similarity is in the use in s. 62 of the words "remove . . . obstruction of any kind calculated to impede the free flow of water" where "obstruction" includes weeds, and the use in s. 67 of the words "necessary . . . that existing drains . . . should be cleansed, widened, deepened, straightened, or otherwise improved", and it is suggested by complainant's counsel that "cleansed" should be read *ejusdem generis* with "widened, deepened, straightened" and for this reason by "cleansed" something more than a mere removal of growths is contemplated.

I am inclined to agree with this interpretation partly because of the *ejusdem generis* rule and partly because s. 67 is in a Part of the Act headed "Powers of private owners" whereas s. 62 is in a Part headed "Powers of Local authorities" and is referred to in s. 47 of the Finance Act, 1933 (No. 2), which repeals s. 25 of the Land Drainage Act, 1908, and is in substitution for it. Section 47 (1) of the Act reads in part:

"Every Drainage Board shall cause all watercourses . . . to be properly cleared and cleansed and maintained in proper order:

"Provided that nothing in this subsection shall prohibit the Board from exercising the powers conferred on it by section sixty-two of the Land Drainage Act, 1908, as amended by section seven of the Land Drainage Amendment Act, 1913."

I think that now what is contemplated by s. 62 as to conditions described in the present case is an order by a local authority for removal of obstructions and "clearing and cleansing" by removal of weeds and growths "calculated to impede the free flow of water" as contracted with an improvement to the natural flow by work such as described in s. 67 as straightening, widening, and deepening.

The result is a conclusion that the complainant is entitled without expense to him to have the free flow of water in the drain restored by compliance with an order for the removal of obstructions. If he required more than that, if he requires an improvement in the flow by which I mean an improvement on the natural free flow (even by "cleansing" of more than obstructions including weeds and growth) he would have to proceed under Part IV.

Further "cleansing" as an improvement under s. 67 might include such matters as improving by purifying. That would clearly not be a removal of obstruction.

Section 62 clearly makes it obligatory upon every occupier or owner of land on the banks of any watercourse or drain to remove obstructions including weeds which impede the

"free flow of the water in such watercourse or drain" if required to do so by a proper order.

That is a statutory obligation, and failure renders the owner liable for fine and payment of the expenses of having the removal effected by the local authority.

His redress is to appeal to the Magistrate to determine that the notice shall not have effect. He may still do this if he considers he can show justification for it even after any determination requiring the order on these proceedings. I am of the opinion that there should be a compliance, but the question to what extent the order should be complied with is also to be determined. Further than to say that removal of the sunken bridges, weeds, and tea tree should be ordered I cannot at present go. Whether silt also should be ordered removed depends, I think, on whether its deposit has been caused by the neglect of the owners and occupiers of Mrs. Storror's farm, and of this I have no evidence at present.

I consider the notice is good and should be complied with in so far as removal of obstructions and weeds which impede the free and natural flow of water is concerned.

*Order accordingly.*

Solicitors for the complainant: *Connell, Trimmer, Lamb, and Gerard* (Whangarei).

Solicitors for the respondent: *Johnson (L. A.) and Packwood* (Whangarei).

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### *In re* NORTHCOTE BOROUGH URBAN FARM LAND ASSESSMENTS.

Assessment Court. 1952. August 11, 12, 13, 27, before Mr. J. W. KEALY, S.M., at Auckland.

*Rates and Rating—Urban Farm Land—Farm-land List—Test of Inclusion of Land in List Its Dominant Use—Likelihood of Land being required for Business Purposes—Possible Completion of Harbour Bridge disregarded—"Urban farm land"—Urban Farm Land Rating Act, 1932, ss. 2, 13.*

The test to be applied to the inclusion of land, which is not exclusively used for agricultural purposes, in an urban farm-land roll is its dominant use; before it can be so included, it must be used principally for agricultural purposes in terms of the definition of "urban farm land" in s. 2 of the Urban Farm Land Rating Act, 1932.

*In re Boyd's Estate and Mt. Roskill Road Board* (1947) 6 N.Z.L.G.R. 233) distinguished.

While the definition of "urban farm land" in s. 2 of the statute excludes land which is "likely", in the opinion of the Court, "to be required for building purposes within a period of five years from the date on which such opinion is expressed", the Court, in considering whether certain land might be so required, disregarded, so far as these proceedings were concerned, any question of the immediate commencement and completion of the Auckland Harbour bridge.

OBJECTIONS by a number of ratepayers to the non-inclusion of certain lands in the farm-land list for the Borough of Northcote, before an Assessment Court constituted under the Urban Farm Land Rating Act, 1932.

*H. Smytheman*, for the Borough.

*H. Rosen*, for the Commissioner of Crown Lands.

*G. P. Hanna*, and other counsel, for the several objectors not appearing personally.

*Cur. adv. vult.*

The judgment of the Court was delivered by

KEALY, S.M. There is no need, for the purposes of this judgment, for any exhaustive setting-out of the facts involved. Decisions have already been given in each individual case on the question of whether or not individual pieces of land should be included, and the hearings were at that stage adjourned (by consent) to enable the exact degree of relief to be given in each case to be decided at a later stage.

In the main, the questions to be decided were ones of fact, and no new principle was involved.

Two points of importance arose during the hearing, however, which were common to the cases of all objectors, and upon which it is desirable that the Court should give reasons for its decision.

The first of these concerns the attitude which the Court should take to the possible imminence of the construction of the proposed Auckland Harbour bridge.

The definition of "urban farm land" as contained in the Act specifically excludes land which is "likely", in the opinion of the Court, "to be required for building purposes within a period of five years from the date on which such opinion is expressed". After giving careful consideration to the evidence placed before it, the Court has formed the opinion that, if the past growth of the settlement in Northcote is to be taken as its guide, then the land in question is not likely to be required for building purposes within the time stated.

The completion of the proposed harbour bridge, however, would almost certainly result in a heavy demand for building sections in Northcote. Is this a matter which the Court is required to take into consideration, bearing in mind the fact that a Harbour Bridge Authority has been constituted and has called tenders for the construction of the bridge? While no actual evidence has been given on the point, it is, of course, common knowledge that certain financial obstacles at the moment stand in the way of the acceptance of a tender, and that the exact time required for the completion of a work of such magnitude must also remain, to some extent, a matter of conjecture.

As was stated very clearly at the hearing, this Court does not propose to allow itself to be tempted into expressing any opinion whatever as to the date upon which the construction of the bridge will be either commenced or completed.

If the matters at issue in the present proceedings concerned the market value of land, then the proposals for the construction of a bridge, and the apparent imminence of the commencement of the work, would undoubtedly be relevant as affecting the price which a willing purchaser would be prepared to offer for land in Northcote Borough.

But the point now in issue is not as to the market value of land (which in some circumstances may be affected even by rumours concerning a proposed public work), but is as to the time at which farming operations should terminate and land be cut up and sold for building purposes. This being so, and in view of the present lack of definite information as to the likely date of completion of the bridge, the Court feels that, so far as the present proceedings are concerned, any question of the immediate commencement and completion of the harbour bridge should be disregarded.

If in fact the bridge should not be completed during the currency of the present farm-land roll, then obviously no harm will be done. If, on the other hand, it should happen that the bridge is erected within, say, the next three years, then it will be open to the Borough Council to take action under s. 26 of the Act, if it desires to do so, and increase the special rateable values of properties included in that roll. No party will therefore suffer injustice as the result of this portion of the Court's decision.

The second difficulty encountered by the Court was that, in excluding a considerable number of properties which had previously been included on its farm-land roll, the Council was influenced by the decision of *Luxford, S.M.*, in *In re Boyd's Estate and Mt. Roskill Road Board* ((1947) 6 N.Z.L.G.R. 233. In the course of his decision (a decision with which, on the facts as given in the report, I would agree), the learned Magistrate states: "The individual piece of land must maintain its character in its entirety in order to remain on the roll" (*ibid.*, 176).

In reliance on this dictum, the Council omitted from the farm-land roll not only properties where substantial subdivision was proposed, but also properties where plans had been submitted for a minor degree of subdivision along an existing road frontage, and even those where no such subdivision was proposed by owners, but where the Council considered that a minor degree of subdivision (to an existing road frontage) ought to take place.

The definition of "urban farm land" in the Act, however, expressly refers to land used exclusively or principally for purposes of agriculture, &c., and this Court must be guided by the language used in the Act.

Applying that language, then, it seems abundantly clear that what is required is, not that land must be used "in its entirety" for agricultural purposes before it may be included in an urban farm-land roll, but that it must be used "principally" for such purposes. What may be termed the "dominant" use is the test.



Upon this principle, and being satisfied that in the present cases the other requirements of the definition have also been satisfied, the Court must hold that the Northcote Borough Council acted erroneously in excluding the lands in question from its urban farm-land list. It follows that the decision in *Boyd's* case is distinguished, and the particular sentence quoted from the decision in that case is treated as *obiter*.

Solicitors for the Borough: *Brookfield, Prendergast, Schnauer, and Smytheman* (Auckland).

### IN RE WEBSTER.

1953. April 16; May 7. Land Valuation Committee (No. 2), Mr. J. W. KEALY, S.M., Chairman, at Auckland.

*Valuation of Land—Tenanted Property—Land Subject to Normal Statutory Tenancy or Short-term Contractual Tenancy—Valuation on Basis of Sale with Vacant Possession—Valuation of Land Act, 1951, ss. 2, 41 (2), 54 (1)*

Section 45 (1) of the Valuation of Land Act, 1951, does not apply to land held on a normal statutory tenancy or to a contractual (monthly or weekly) tenancy; and the method of valuation of land subject to a lease therein prescribed (namely, with separate assessments of the landlord's and tenant's respective interests) is inapplicable to the case of land held on the basis of such a tenancy.

No distinction should be made between tenanted and untenanted properties in assessing values for normal revision purposes in cases where the provisions of s. 45 are inapplicable, as the making of any such distinction would defeat the need for preserving "uniformity with existing" roll values of comparable parcels of land", within the meaning of s. 41 (2) of the statute.

*Semble*, Different considerations may apply to special valuations made, for example, for death-duty purposes, in cases where the special provisions of s. 45 do not apply.

OBJECTION to the valuation to be placed upon a tenanted property.

There was no dispute as to the facts; and it was conceded by all parties that (as at March 31, 1952, the date of the valuation) the property in question might have been expected to fetch the sum of £1,975 if offered on the market in the normal way and upon the basis of vacant possession being available to a purchaser, whereas it was likely only to have fetched £1,500 if offered for sale on similar terms, but as a "tenanted" property.

The valuation in question was one of a series made during the normal revision of valuations by the Valuation Department in respect of properties situated in the Mount Eden Borough, and was not an isolated valuation made for a special purpose.

*Cur. adv. vult.*

The judgment of the Land Valuation Committee was delivered by

KEALY, S.M. (Chairman). It was stated on behalf of the Valuation Department that, when making revision valuations of a large number of properties in the course of ordinary routine, the Department's officers did not normally make distinctions between properties in fact occupied by their owners, and other similar properties occupied by tenants, but valued both these types of properties on the basis of what their respective market values would be if offered for sale with "vacant possession".

In the case of special valuations made for death-duty purposes, however, the Department did make a distinction between tenanted and untenanted properties, and valued the former on the basis of what they would be likely to fetch on the market if offered as "tenanted" properties. This purpose was achieved by assessing the value of the "owner's interest" in such properties.

The motives prompting the Department in adopting this practice are, of course, both obvious and just. It would be clearly inequitable if the estate of the deceased owner of a tenanted property, of which vacant possession could not be secured, were to be compelled to pay death duty on a value substantially in excess of the amount which could be obtained by selling such property. It would be equally inequitable if owners of properties in which they were themselves residing should be asked to bear a substantially higher proportion of rates than absentee landlords, merely because, being themselves occupiers, they could notionally give vacant possession of their properties in the event of hypothetical sales, and so in theory secure higher prices.

In the present case, the objector, who is the owner of a tenanted property, objects to the valuation of such property on the ground that if offered for sale subject to the existing tenancy, such property would, owing to the effect of the Tenancy legislation, not realise as much as the Department's assessment.

By s. 2 of the Valuation of Land Act, 1951, "Capital value" is defined as follows:—

"'Capital value' of the land means the sum which the 'owner's estate or interest therein, if unencumbered by any 'mortgage or other charge thereon, might be expected to 'realize at the time of valuation if offered for sale on such 'reasonable terms and conditions as a *bona fide* seller might 'be expected to require:'"

Section 15 of the same Act reads:—

"The Valuer-General may also at any time, and from 'time to time, during the currency of a roll make such 'alterations or adjustments of value in the case of land 'which is leased or subject to any other terminable charge 'or interest as are necessary for the purpose of correctly 'assessing the respective interests of the respective owners 'at any specified time."

Section 45 (1) provides that:—

“Where land is subject to a lease or in any other case  
“where there are more interests therein and more owners  
“than one, the united capital values, values of improve-  
“ments, and unimproved values respectively of the interests  
“of all owners shall not be estimated at less than the capital  
“value, value of improvements, and unimproved value of  
“the land would be estimated at if held by a single owner  
“in fee simple and free from any lease or encumbrance,  
“anything to the contrary in this Act notwithstanding.”

Section 45 (2) (f) defines “Lease” as follows:—

“‘Lease’ includes agreement to lease, licence, and any  
“other written document for the tenancy or occupancy of  
“land; ‘rent’ includes premium, fine, royalty, and any other  
“consideration for the tenancy or occupancy of land.”

For many years past it has been a common (though not universal) practice for separate assessments to be made of the landlord's and the tenant's respective interests in the case of leases for a term of years.

The first point at issue in the present case is as to whether a similar division of interest can be made in the case of tenanted properties held on short-term contractual or statutory tenancies. It is a point which was of academic interest only in the past, for a tenant whose interest could be effectually terminated by one month's notice (or less) could hardly be said to have any financially assessable interest in a property. Today, under the provisions of the Tenancy Act, 1948, and its Amendments, a tenant may well possess what, in effect, amounts to a very valuable interest. Such interest could scarcely be valued for death duty purposes in the case of the death of a tenant, for it is not an interest which a tenant (or his executors) could legally assign or realize upon; but its existence is undoubtedly a depreciating factor which very materially affects the price that a landlord, seeking to sell a tenanted property, is able to obtain.

Neither the objector nor the Department has been able to cite any relevant authorities; but the Department advances the argument that a rent book would constitute a “written document for the tenancy or occupancy of land” within the meaning of s. 45 (2) (f) of the Valuation of Land Act, 1951; and that, consequently, any tenanted property in respect of which a rent book is in existence may be treated by the Department as land “subject to a lease”.

The Committee finds itself unable to accept this contention. When the remainder of s. 45 is looked at, with its elaborate, and (to quote the decision of *Reed, J.*, in the case of *Colonial Sugar-Refining Co. v. Valuer-General* ([1927] N.Z.L.R. 617; [1927] G.L.R. 433) “much less fair and reasonable” method of computing the value of a lessee's interest, it will be seen that such a method seems completely inapplicable to the case of land held on the basis of the normal statutory or contractual (monthly or weekly) tenancy; and the Committee does not consider that s. 45 applies to such tenancies.

This being the position, the definition of "Capital value" has to be considered; and, in doing so, the Committee considers that the Act as a whole must be looked at. It will be seen that the Act contemplates the use of valuations for various differing purposes: see ss. 28 and 31. A most significant factor becomes apparent when the contrasting provisions of ss. 32, 42, and 41 are examined. In the case of the two first-mentioned sections, the Valuer-General is charged with the duty of making what s. 42 refers to as a "correct" valuation. Under s. 41, on the other hand (which provides for revaluation on the request of an owner) the Valuer-General's duty is "to preserve uniformity with existing roll values of comparable parcels of land."

In these circumstances, in the view of this Committee, inasmuch as no reference whatever is made in the definition of "Capital value" to any distinction as between tenanted and untenanted properties, no such distinction should be made in assessing values for normal revision purposes in cases where the provisions of s. 45 are inapplicable. The making of any such distinction would clearly defeat the expressly-stated need for preserving "uniformity with existing roll values of comparable parcels of land."

In the case of special valuations made, for example, for death duty purposes, while it is unnecessary to decide the point in these present proceedings, different considerations may well apply. In this second type of case, the need for preserving uniformity with the roll values of other nearby properties does not arise, and the special provisions of s. 15 of the Act would appear relevant. It will be noted that this section refers not only to land which is leased but also to land which is subject to "any other terminable charge or interest." This latter expression would include a short-term tenancy. It is of course well-settled law that a valuation of land made for one purpose is not to be taken as conclusive when another valuation is required to be made for a different purpose; and it would appear (though the Committee does not purport to decide the point) that when assessing the value of a tenanted property for death duty or other similar purpose the Valuer-General would be acting correctly by fixing the value at the figure which the property concerned might be expected to fetch if sold subject to the tenancy. This is, of course, in cases where the special provisions of s. 45 do not apply.

In the present case the capital value of the property will be fixed at £1,975. Unimproved Value at £525 and Value of Improvements at £1,450.

## IN RE BULLER COUNTY ELECTION.

1953. December 2, 3, 4, before Mr. C. C. MARSACK, S.M., at Westport.

*Local Elections and Polls—Nomination Paper for County Election—Signatures of Two Nominating Electors in Body of Nomination Paper not invalidating Same—Prescribed Deposit of “three pounds”—Deposit sent by Cheque on Outside Bank—Deposit required to be in Legal Tender—Returning Officer’s Rejection of Nomination Paper upheld—Local Elections and Polls Act, 1953, ss. 13, 15; First Schedule, Form 4.*

A nomination paper of a candidate, C., for the election of a County Councillor for the Charleston Riding of the Buller County was received by the Returning Officer at Westport at 12.20 p.m. on the day before the last day for receiving nominations. The nominators had signed their names at the head of the prescribed statutory form, but not in the space provided for signatures. This form was accompanied by a cheque for £3, drawn on a Greymouth bank.

The Returning Officer rejected the nomination on the ground that the form was not signed as required by the Local Elections and Polls Act, 1953, and wrote to the candidate returning the rejected form and the cheque. No objection was taken in the letter to the fact that the deposit was paid by cheque or to lack of exchange on the cheque; though, at the hearing of the election petition arising out of the rejection of the nomination paper, there was put forward the further ground that the lodgment of a cheque was not a deposit of “three pounds”, as required by s. 15 of the statute.

On a petition under s. 66 of the Local Elections and Polls Act, 1953, for a declaration that the election of a Councillor for the Charleston Riding of the Buller County was void,

*Held*, 1. That, the nomination form admittedly bore the signatures of “two electors of the district”, as required by s. 13 of the statute, and it could properly be described as being signed by them.

*Caton v. Caton* ((1867) 36 L.J. Ch. 886) applied.

*Knight v. Crockford* ((1794) 1 Esp. 190; 170 E.R. 324) and *In re Gibson* ([1953] N.Z.L.R. 122) referred to.

2. That, although the Returning Officer did not take the objection to payment by cheque as a deposit at the time of its receipt he was entitled to do so at the hearing of the petition; and, further, that he had no power to waive a statutory requirement.

3. That, as s. 15 of the statute, in requiring payment of "the sum of . . . three pounds", calls for a deposit in some form of legal tender, the Returning Officer had no power to accept anything but legal tender, and a cheque was not normally legal tender.

*In re Tracey* ((1909) 4 M.C.R. 82) and *In re Otaki Mayoral Election* ((1933) 28 M.C.R. 105) referred to.

*Perrin v. Morgan* ([1943] 1 All E.R. 187) distinguished.

4. That, accordingly, the nomination paper was properly rejected; and the petition failed.

PETITION under s. 66 of the Local Elections and Polls Act, 1953, for a declaration that the election of a County Councillor for the Charleston Riding of the Buller County held on October 31, 1953, be declared void. Three grounds were set out in the petition, and of these the second, alleging a failure of duty on the part of the Returning Officer, was abandoned at the hearing.

The learned Magistrate ruled that the petitioners cannot succeed on the third ground, which alleged irregularity in the nomination paper by the successful candidate, Mouat. The petitioners set up that the signatures of the nominators, Hampton, Manderson, Currie and Mitchell at the foot of the form were forged, and a handwriting expert, Samuel Hall, was called to affirm that, in his opinion, none of those signatures was written by the same person as wrote in each case admittedly authentic signatures of the nominators. Three of the persons concerned, Hampton, Currie and Mitchell, gave evidence before me confirming that they had, in fact, signed their names in the place in dispute; and the opinion of the expert, however good the reasons on which it was based, could not be allowed to override the direct sworn evidence of the nominators to the extent that the opinion could be held, in opposition to the sworn evidence, to establish definite proof of the crime of forgery.

There remained for consideration the first ground—namely, that the nomination of William James Cairns was wrongly rejected.

The nomination paper in question was handed to the Returning Officer by Newman's driver at 12.20 p.m. on the day before the last day for receiving nominations. With it was lodged a cheque for £3, drawn on a Greymouth bank.

The nominators, W. C. Fischer and S. F. Butterworth, had signed their names at the head of the form, but not in the space provided for signatures. The form as handed to the Returning Officer thus reads as follows:

## "BULLER COUNTY COUNCIL

TO THE RETURNING OFFICER OF THE BULLER COUNTY COUNCIL,  
We, "W. C. Fischer" and "S. F. Butterworth" being two  
duly qualified Electors of the Buller County, hereby nominate

William James Cairns

as a candidate for the Charleston Riding at the present election.

Signed this 5th day of October, 1953.

..... Elector

..... Elector

I hereby consent to this nomination and enclose £3 deposit.

"W. J. Cairns" Candidate

Received at the hour of..... on the..... day of..... 19.....

..... Returning Officer."

The Returning Officer rejected the nomination on the grounds  
that the form was not signed as required by the Act, and wrote  
to the candidate returning the rejected form, and the cheque.  
His letter reads:

"Buller County Council,  
Westport.  
8th October, 1953.

"Mr. W. J. Cairns,  
Private Bag,  
Pahautane,  
Greymouth.

Dear Sir,

"I return herewith your nomination form and cheque for  
"£3 deposit. Under Section 13 of the Local Elections and  
"Polls Act, the nomination paper must be signed by the two  
"Electors of the district. I have marked the places in red  
"where they should sign and should you have any difficulty  
"in obtaining the signatures of the two electors, I have  
"enclosed another form which you will no doubt have signed  
"by two other electors.

"I would draw your urgent attention to the fact that the  
"nomination form properly completed, with the deposit of  
"£3 must reach me by noon, on Friday, the 9th day of  
"October—that is tomorrow.

Yours faithfully,

(Sgd.) C. F. SCHADICK.

Returning Officer."

*Sullivan*, for the petitioners.

*Maitland*, for the Returning Officer.

*Craig*, for the respondent.

*Cur. adv. vult.*

MARSACK, S.M. It is to be noted that no objection was taken  
to the fact that the deposit was paid by cheque, and no reference  
is made to lack of exchange on the cheque. The Returning  
Officer gave evidence that he had observed, on receiving the  
cheque, that it did not include exchange. Cairns, however,  
produced the cheque which had exchange added, and swears that  
it has not been altered since it was handed to the Returning  
Officer. The onus of proving that the cheque was for a lesser

amount, net, than £3, is on the party setting it up, and I must hold that the onus has not been discharged.

It was particularly unfortunate that the Returning Officer's letter with the forms and the cheque reached the candidate after nominations had closed.

Although the rejection of Cairns's nomination was based solely on the ground that the form was not correctly signed, counsel for the Returning Officer at the hearing took the further ground that the lodgment of a cheque was not a deposit of "three pounds" as required by s. 15 of the Act. I have thus to determine two questions:

- (1) Is the form of nomination as submitted "a nomination paper in the form number (4) in the First Schedule (to the Act) signed by two Electors of the District, and by the candidate in token of his assent to the nomination", as required by Section 13 of the Act.
- (2) Is the lodgment of a cheque for £3 a compliance with Section 15 which required the candidate to deposit with the Returning Officer "the sum of £3".

Dealing first with question (1). Both Fischer and Butterworth gave evidence that they intended their signatures to operate as a written nomination of the candidate Cairns, and this evidence must be accepted. Form (4) of the First Schedule to the Act makes it clear that the signatures of the nominators at the end of the first part of the form, following the words "Signed this                      day of                      195                      ". But a mistake in the use of a form in the First Schedule is not necessarily fatal to its validity: *Local Elections and Polls Act, 1953, s. 99 (2)*. The signature to a commercial document need not be placed at the end. This is made clear by the judgment of the House of Lords in *Caton v. Caton* ((1867) 36 L.J. Ch. 886). *Lord Colonsay* said: "It is not necessary that the signature of the party should be placed in any particular position upon the paper, whether it is subscribed or superscribed or otherwise placed so as to shew that it was . . . intended to govern the matter that is contained in the document" (*ibid.*, 892). The Lord Chancellor in that case states that a signature written in the body of the document, to be valid as a signature, "must be inserted in the writing in such a manner as to have the effect of 'authenticating the instrument', or 'so as to govern the whole agreement', or . . . 'so as to govern what follows'" (*ibid.*, 889). And further, at p. 891: "It follows, therefore, that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute (of Frauds) and to give authenticity to the whole of the memorandum" (*ibid.*, 891). In the case of wills, a similar principle operates: *vide*, the judgment of *Adams, J.*, in *Re Gibson* ([1953] N.Z.L.R. 122).

The old case of *Knight v. Crockford* ((1794) 1 Esp. 190; 170 E.R. 324) provides a close parallel to the present one. There, where the only signature to the agreement was found in the opening sentence, "I, James Crockford agree . . .", it



was held that this was a sufficient signature to comply with the Statute of Frauds.

Counsel were unable to refer me to any decisions as to the validity or otherwise of nomination papers upon which the signature of the nominators appeared in the body of the documents and not in the space provided. Mr. *Maitland* contends strongly that no analogy should be drawn from the principles governing the agreements and other documents *inter partes* under the commercial law. He further contends that the names "W. C. Fischer" and "S. F. Butterworth" do not purport to be signatures, but occur only incidentally; they are not, in his submission, intended to authenticate the document.

In the absence of direct authority to the contrary, there seems to be no good reason why the principles laid down in *Caton v. Caton* ((1867) 36 L.J. Ch. 886) should not apply to a form under the Local Elections and Polls Act, 1953, particularly as s. 99 of that Act indicates that the forms are not to be treated as sacrosanct. In my opinion, the signatures of the nominators do not "occur incidentally". I accept the evidence of these gentlemen that they did intend their signatures to "authenticate the document", and I find that the document was so authenticated. Section 13 of the Local Elections and Polls Act, 1953, merely requires that Form No. 4 should be "signed" by two Electors of the district". The Form in question admittedly bears the signatures of two Electors of the District, and can, I think, be properly described as being signed by them. In my view, the Returning Officer was not entitled to reject Cairns's nomination form on the ground that it was not signed. It would have been prudent on his part, perhaps, to take steps to have the form re-signed in the appropriate place, and this is what he no doubt had in mind when he returned the nomination paper to the candidate. But he should not have rejected the nomination out of hand, and thus, in view of the delay in the mails, virtually rendered it impossible for a duly nominated candidate to take part in the election.

There remains for consideration the question as to whether the candidate, in sending in a cheque for £3 on a Greymouth bank, complied with the statutory requirements of depositing with the Returning Officer the sum of £3. The nomination was not rejected by the Returning Officer on the ground that payment by cheque was not a compliance with s. 15, and the Returning Officer stated in evidence that in at least one other case he accepted a cheque as a deposit. Mr. *Maitland* contends that, although the Returning Officer did not take the objection at the time, he is entitled to do so now; and, further, that the Returning Officer has no power to waive a statutory requirement. Both these contentions are, I think, well founded. What I have to decide is whether a cheque on an outside Bank can properly be described as "the sum of three pounds".

Mr. *Sullivan* relies strongly on the judgment of the House of Lords in *Perrin v. Morgan* ([1943] 1 All E.R. 187). In that case, it was held that the term "all moneys of which I die" "possessed" used in a will drawn by the testatrix herself included such property as stocks, shares and debentures. By

analogy, Mr. Sullivan says that, as the term "money" is wide enough to include stocks and shares, it would also include a cheque. I do not think that case can be used as an authority on the meaning of the phrase "the sum of £3" in s. 15. The Lord Chancellor is careful to point out that no attempt is made to give an exhaustive definition of "money", which, he says, has not got one natural or usual meaning; it has several meanings, each of which, in appropriate circumstances, may be regarded as natural. He refers to the fundamental rule in construing the language of a will, which "is to put upon the words used "the meaning which, having regard to the terms of the will, "the testator intended" (*ibid.*, 190). In construing a statute, the test is not what was intended, but what is said. In any event, the word "money" is not used in s. 15.

In two cases, under the Local Elections Act, 1908, and the Local Elections and Polls Act, 1925, respectively, it was held that the deposit to be lodged with an election petition must be in cash, and that the handing in of a cheque was not a compliance with the statutory requirement. These are both Magistrates' Court cases: *In re Tracey* ((1909) 4 M.C.R. 82), and *In re Otaki Mayoral Election* ((1933) 28 M.C.R. 105). In each case, the learned Magistrate held that the provisions of the Act called for a deposit in money that is legal tender: Bank notes or coin of the Realm.

In my view, the words "the sum of £3" in s. 15 mean £3 in legal currency, and a cheque or other bill of exchange would not fulfil the requirements of the section. A cheque is not normally legal tender. Under the commercial law, a cheque may be accepted as such, but, in that case, the receiver of the cheque is considered as having waived any objection to the nature of the tender. Such waiver is permissible *inter partes*, in matters of contract. The rights and duties of the Returning Officer are fixed by statute, and the statute confers on him no right to waive a statutory obligation. I have no doubt that in practice many Returning Officers accept cheques in payment of deposits, when candidates are known to them and they are confident that the cheques will be met. In this present case, at least one other cheque was accepted by Mr. Schaddick, and, if the nomination form of the candidate Cairns had been signed in the usual place, I have no doubt that his cheque also would have been accepted without comment. But, as I think that s. 15 calls for a deposit in some form of legal tender, and that the Returning Officer has no power to accept anything but legal tender, then I conclude that the candidate did not, at the time the nomination paper was delivered to the Returning Officer, deposit with the Returning Officer the sum of £3.

The consequence of this failure is specified in s. 15: "no nomination of a candidate at any such election shall be "accepted by the Returning Officer unless that deposit is so "made."

The Returning Officer did not, in fact, accept the nomination of William James Cairns, even though his refusal was based on other grounds.

In my view, therefore, the nomination paper of William James Cairns was properly rejected.

None of the grounds upon which the petition is founded has thus been established, and the petition fails.

Mr. Cairns has been unfortunate in this matter, first, in not receiving the Returning Officer's letter of rejection in time to lodge another nomination paper, and, secondly, in having his nomination declared invalid on a ground which was not taken at the time. But hard cases cannot be allowed to make bad law; and, if my view of the law is correct, he has no remedy.

The Returning Officer and respondent Mouat will each have their costs against petitioners, £10 10s. in each case together with disbursements (if any) and witnesses' expenses to be fixed by the Registrar. The deposit of £10 lodged by petitioners will be applied *pro tanto* towards payment of these costs, after payment thereof of advertising expenses.

*Petition dismissed.*

Solicitor for the petitioner: *D. J. Sullivan* (Westport).

Solicitors for the returning officer: *Cottrell, Lovell, and Maitland* (Westport).

Solicitor for the respondent, the successful candidate: *A. C. Craig* (Westport).

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#### ADAM v. ATTORNEY-GENERAL.

1952. November 18. 1953. April 13, before Mr. J. G. WARRINGTON, S.M., at Westport.

*Nuisance—Smoke from Chimney—Power-house operated under Statutory Authority—No Liability for Nuisance by Smoke from Power-house Chimney without Negligence.*

Where Parliament has authorized an act, then by implication it has also authorized all inevitable results of that act, and the authorized person is not liable for nuisance in the absence of negligence.

*Geddis v. Bann Reservoir Proprietors* ((1878) 3 App. Cas. 430); *Provender Millers (Winchester), Ltd. v. Southampton County Council* ([1940] Ch. 131; [1939] 4 All E.R. 157) and *Longhurst v. Metropolitan Water Board* ([1948] 2 All E.R. 834) referred to.

Thus, where smoke and noxious products of combustion emitted from the smoke-stack of a power-house, owned by the Crown and operated by the Mines Department by statutory authority, caused damage to a neighbouring house and land and annoyance and discomfort to the owner and

his wife, and it was proved that the Crown had acted without negligence, the house-owner's claim for damages failed.

Dictum by *Lord Dunedin*, as to the criterion of inevitability, in *Manchester Corporation v. Farnworth* ([1930] A.C. 171, 183) applied.

ACTION in which the plaintiff claimed damages for damage to his house and land and annoyance and discomfort to himself and his wife, caused from the month of June, 1951, down to the time of the hearing by the intermittent discharge into the air and deposit on his property of noxious products of combustion from the Power-house of Ngakawau. The Power-house was owned by the Crown: it was erected in 1908 by the Westport Coal Co., Ltd., but it had been acquired by the Crown in 1948, and had since been operated by the Mines Department.

*D. J. Sullivan*, for the plaintiff.

*H. A. E. Maitland*, for the defendant.

*Cur. adv. vult.*

WARRINGTON, S.M. The plaintiff claims that, although he built his home eleven or twelve years ago just across the road from the Power-house and alongside the then bowling green, there was no trouble with deposit of soot until about two and a half years ago when six new boilers were installed and a new smoke-stack erected. From the time of erection of the new smoke-stack, he claims that, whenever the prevailing night-wind blows from the Gorge across the Domain and out to sea, smoke from the Power-house comes over his property, and soot and cinders can be seen and felt to fall on his house and land and that, as a result, his paintwork, spouting, and roofing iron, interior painting, papering, and woodwork, and his garden have suffered serious damage, and his wife and he have been caused serious discomfort and sundry annoyances which were detailed in evidence. The witnesses called for the plaintiff were unquestionably honest, although one may perhaps question the weight that should be attached to the damage estimates of a tradesman who conceded that, when measuring and tendering for the job, he had not noticed if the roofing laps were painted or not (though he took off sheets of iron), and had taken it for granted that the walls were "scrimmed". His engineer witness considered that a more successful elimination could be achieved with bigger fans and a better washing apparatus, a higher chimney-stack and the use of a better class of coal. Quoting from a text-book, he suggested three possible types of apparatus: electro-static precipitation, 96 to 97 per cent. efficiency, centrifugal action with washing, 82 to 98 per cent. efficiency, and a dry type, 90 to 94 per cent. efficiency. He considered that the system in use was only part of the centrifugal system, but conceded that his examination was only external and could not be complete without seeing the system stripped down. He also properly conceded that he was not aware that the fan had been adapted as a "Cyclone dust

"eliminator" and that, if it were as efficient as the defendant claimed, then the defendant had gone a long way towards eliminating the trouble: that he had not seen electro-static precipitators in action; and that the smoke nuisance was a complex problem which was causing a great deal of concern all over the world, and had troubled scientists for many years: that Stockton underground coal is a good steam coal but open-cast not so good, and that he did not know in what proportions they were used in the Ngakawau Power-house.

The defendant's four main submissions in defence were:

1. That the damage alleged came from other sources, *e.g.*, passing trains.

2. That the damage was inflated, and no more than fair wear and tear and usual depreciation in a mining district.

3. That, if any damage caused for which the defendant is liable, the amount paid into Court with a denial of liability (£50) was sufficient.

4. That the defendant is operating the Power-house in terms of statutory authority and cannot be liable if he has acted without negligence,

and, in support of his submissions, called the head supervisor at Ngakawau the net effect of whose evidence was that all complaints have been since the installation in 1950 of a plant from Huntly; that, as soon as complaints were received, samples and tests were taken, and alterations made to the outside cowl, while the fan was altered to a "Cyclone" type to take the grit from the flue gases; that, after all alterations, tests were again taken, and, whereas before the alterations a sample jar in the outlet would fill with grit in six hours, after the alterations it took thirty-six hours to fill; that, as far as the Mines Department was concerned, the Power-house was intended to close down with the provision of State Hydro Electric-power originally promised for March, 1952, but now expected about March, 1953; that he had examined the plaintiff's house which did not appear any worse than any other house in the district painted over four years ago; that the Department could not increase the height of the stack without new foundation, rebuilding and special staying. Herbert John Hardie, Electrical Inspector of Mines and Mechanical Engineer to the Mines Department, deposed that it was not commercially feasible entirely to eliminate smoke, that remedial measures were costly and difficult, and needed exhaustive tests and trials on the troublesome plant *in situ* followed by equipment which would need to be specially designed and supplied from overseas.

The estimated time in the case of the King's Wharf had been five years. In April, 1950, it had been thought that the trouble was through forcing one boiler and would be alleviated with the bringing in of other boilers. When this was found not to eliminate the trouble, further tests and measures were taken, and the fan converted to work as a centrifugal fan, to the same design as the "Buffalo" fan. Mr. Hardie personally investigated complaints and attended to alterations. He did not think any further improvement could be made by mechanical means or by any New Zealand authority, and it would now be

a matter of submitting samples to expert overseas suppliers with a request that they tender for the manufacture and supply of equipment suitable to all local conditions of fuel, wind, atmosphere and all other variable factors combining to cause the problem. The Mines Department, taking into account that it might well take three to five years to get such plant and that State Hydro Electric-power had been promised in less than two years from the time of the first operation of the plant complained of, had taken on the responsibility itself and largely reduced the amount of "fly-ash" by the alterations effected; that no plant was 100 per cent. effective: that there were no electrostatic precipitators in New Zealand to his knowledge and that King's Wharf, after two years' inquiries, were putting in "Cyclone" fan type; that, within the Department's means and time, he did not know of anything further or better that could have been done. Frank Nelson, foreman-carpenter, deposed that in this district good paint would not last more than five years, and some paint did not last twelve months; that Adams was only 350 yards from sea, and salt air would affect his paint and roofing; and that the Department had estimated to paper and paint and Pinex the ceilings for \$54. He conceded that investigation under the roof showed a lot of loose black soot and that the spouting was full of ash. Henry Hutchison, engineer, deposed that, on the West Coast, houses have to be painted from three to five years, and that, in the mining townships, galvanized spouting lasts only four to five years. James Milner Hope, mining engineer, deposed to tests of samples.

The evidence did not reasonably support the first contention of the defence that the damage came from other sources than the Power-house.

The evidence did, in part, support the second contention of the defence that the damages claimed were too high, making a reasonable allowance for normal fair wear and tear in a mining district, but did not fully support the third submission of the defence that the amount paid into Court with denial of liability was enough. Before making any further comment on this, I pass to consider the fourth submission. This contention that the defendant is operating the Power-house under statutory authority and cannot be liable if it has acted without negligence requires a more detailed consideration of the law and its application to the facts established.

It is, of course, well-settled law that, where the Legislature has authorized an act, then, by implication, it also authorizes all inevitable results of that act, and the doer is not liable for nuisance in the absence of negligence.

"The test of the necessity of a consequence is the impossibility of avoiding it by the exercise of due care and skill": *Salmond on the Law of Torts*, 10th Ed., 41. "The criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain commonsense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense": per Lord Dunsedin in *Manchester Corporation v. Farnworth* ([1930] A.C. 171, 183).

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I do not intend to lengthen this judgment by further quotations from relevant authorities, and here only cite certain other decisions which illustrate the application of what is clear law: *Geddis v. Bann Reservoir Proprietors* ((1878) 3 App. Cas. 430); *Provender Millers (Winchester), Ltd. v. Southampton County Council* ([1940] Ch. 131; [1939] 4 All E.R. 157) and *Longhurst v. Metropolitan Water Board* ([1948] 2 All E.R. 834).

I am also indebted to counsel for the opportunity to read the decision of *Luxford, S.M.*, in *McGregor v. The King* (the "King's Wharf case") given at Auckland on April 28, 1949 (unreported).

Applying the law so found to the evidence before me, I find that the defendant has discharged the onus upon him of proving that the injurious result to the plaintiff of the operation of the Ngakawau Power-station was inevitable in the light of the complaints, the immediate investigation, the remedial and at least partly-successful alterations made, and the time-factor involved. To hold any other way on the evidence before me would not appear to be the "common-sense appreciation . . . of practical feasibility" referred to by Lord Dunedin in *Manchester Corporation v. Farnworth* ([1930] A.C. 171, 183).

This finding means that the Court need not consider the assessment of damage, but, lest it should be in point on any possible question of *ex gratia* allowance, it did appear to the Court that, although the quantum of plaintiff's claim did not seem to be fully supported by the evidence, the £50 paid into Court would not be an adequate recompense for the pecuniary damage suffered and the considerable discomfort and inconvenience deposed to.

The plaintiff's claim, therefore, fails and judgment will be entered for the defendant with costs and disbursements (if asked for) to be fixed by the Registrar.

*Judgment for the defendant.*

Solicitors for the plaintiff: *Scully and Sullivan* (Westport).

Solicitors for the defendant: *Cottrell, Lovell, and Maitland* (Westport).

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## POLICE v. MILLER

1952. September 10. 1953. February 10, before Mr. F. MCCARTHY, S.M., at Auckland.

*Transport—Offences—Parking at Night on Road without Lights*  
Mens rea—"Leave a motor-vehicle in any road during the  
"hours of darkness"—"Leave"—Principles applicable—  
Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 7 (1).

Regulation 7 (1) of the Traffic Regulations, 1936, is one of those enactments in which, though from the omission of the word "knowingly" or "wilfully", it is not necessary to aver in the information that the offence under it was "knowingly" or "wilfully" committed, or to prove *mens rea*, and the act itself *prima facie* imports an offence, the person charged may still discharge himself by proving to the Court's satisfaction that, in fact, he had not a guilty mind in respect of the offence with which he is charged.

*R. v. Ewart* ((1905) 25 N.Z.L.R. 709; 8 G.L.R. 22) applied.

The word "leave" in the phrase "leave a motor-vehicle on any road during the hours of darkness" (without the prescribed lighting) in Reg. 7 (1) of the Traffic Regulations, 1936, should be given a meaning which will best affect the mischief at which the Regulation is aimed: the prevention of the presence of unlighted vehicles on the roadway at night.

There is the necessary *mens rea* whenever there is an intention to do the act, or the state of mind, of "leaving", according to the correct interpretation of that word, in the prohibited circumstances, which must be such that there is reasonable likelihood of the vehicle remaining in the roadway in breach of Reg. 7 (1). Whether or not this is so is a question of fact dependent on the time, place, and general circumstances of the happening.

*O'Sullivan v. Burton* ([1947] S.A.S.R. 4) referred to.

INFORMATION charging the defendant that on June 13, 1952, he did leave a motor-vehicle on the road during the hours of darkness, such vehicle not displaying lights in the manner prescribed. The charge was laid under Reg. 7 (1) of the Traffic Regulations, 1936 (Serial No. 1936/86).

The facts either established or admitted disclosed that the defendant was a garage proprietor in Dominion Road, close to the Mt. Albert Road intersection. His premises were next but one to a Service Station owned by Mr. Driver, which was

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on the corner. The defendant had authority to issue Warrants of Fitness, but Mr. Driver had not, and, for some considerable time past, there had been in existence an arrangement between the defendant and Mr. Driver whereby the former issued Warrants of Fitness for vehicles which were brought to him either by Mr. Driver or by one of his assistants. They had a further arrangement by which, after he had completed his examination, the defendant left the vehicles which he had examined either on a vacant section in between the two businesses or, if there was no room there, parked on the roadside where they were collected in due course either by Mr. Driver or one of his assistants or the owner of the vehicle himself. The defendant did not notify Mr. Driver in any way of where he had left the vehicle.

The charges for the Warrants of Fitness were debited by the defendant against Mr. Driver direct and not against the owners of the vehicles.

The learned Magistrate said that he was satisfied that, once the defendant had left the vehicle in one of the manners indicated, he had nothing further to do with it, and his association with it came to an end.

On the day in question at approximately 2.30 p.m., one of Mr. Driver's employees brought the station wagon in question to the premises of the defendant for the purpose of the issue of a Warrant of Fitness. The defendant was unable to examine the vehicle immediately, and consequently it was left. A little later, he examined the vehicle and found that it did not qualify for a Warrant, and he thereupon drove it from his garage and, on finding there was no available space on the section, parked it in the Dominion Road extension, a distance of some 64 yards from the corner and approximately 100 yards from his own garage. He said that this was the closest available parking space he could find, and the learned Magistrate was satisfied that he had left it there so that it could be collected either by Mr. Driver or one of his staff or the owner. He had left vehicles there on previous occasions.

When he went home at 5.20 p.m. that day, the defendant saw that the vehicle was still there. It was then daylight and when he returned to his work the next morning he noticed that the vehicle had not been moved overnight. He did nothing further about the matter. On the Saturday evening, another car collided with the unlighted vehicle and suffered damage.

*J. N. Wilson, for the defendant.*

*Cur. adv. vult.*

MCCARTHY, S.M. [after stating the facts, as above:] I am satisfied that the Regulation is one which comes in the third class of case specified in the judgment in *R. v. Ewart* ((1905) N.Z.L.R. 709; 8 G.L.R. 22) and that the defendant may escape liability if he can show that he had no *mens rea* in respect of the charge levelled against him.

Now the Regulation in question is clearly aimed at preventing the presence of unlighted vehicles in the roadway. The word "leave" or "left" may have a variety of different mean-

ings and these were discussed by Mayo, J., in *O'Sullivan v. Barton* ([1947] S.A.S.R. 4). Some of these meanings may well be applicable to this particular Regulation, but I do not think it is necessary for me to determine the actual meaning save and except to say that I feel it should be given a meaning which will best affect the mischief at which the Regulation is aimed. There are so many different circumstances under which a defendant may be fairly said to "leave" a car that I feel it would be futile to embark upon the subject. As pointed out by Mayo, J., "there is the necessary *mens rea*, whenever there is "an intention to do the act, or the state of mind, of 'leaving', "according to the correct interpretation, in the prohibited circumstances" (*ibid.*, 11). In my view, the prohibited circumstances must be such that there is reasonable likelihood of the vehicle remaining in the roadway in breach of Regulations. Whether this is so or not must be a question of fact dependent upon the time, place, and the general circumstances of the happening.

In the first place, the defendant was clearly in possession of the car for the purpose of inspecting it to ascertain whether it was eligible for the Warrant of Fitness. This bailment came to an end when it was determined in a manner agreed upon by the parties, that is, by placing the car either on the section of land or on the street in accordance with the arrangement. Thereafter in strictness the defendant had no legal connection with the vehicle.

He placed it where he did in the hours of daylight and, in my view, in the light of the clear arrangement that it would be collected, I think he had every reason to believe that it would be picked up before dusk. This is important, because the object of this legislation is to guard against unlighted vehicles being left on the roadway, and I wish to guard myself against being taken to mean that a bailee who has determined his bailment cannot come under the scope of this Regulation. If he were to leave the vehicle either intending that it should remain there during the hours of darkness, or at such time and under such circumstances that a reasonable man would expect that it would remain there during the hours of darkness, clearly he could not escape liability by establishing that his bailment had come to an end.

*Mens rea* may consist of either wilful intent or the lack of reasonable care. There is no suggestion of the first in this case, and, for the reasons I have already given, in my view I feel that the defendant was justified in leaving the car as he did. Accordingly, he has satisfied me that he had no *mens rea* affecting his action in leaving the car as he did, and the information against him must be dismissed. Nor do I think any difficulty is occasioned by his act in passing the vehicle by on Saturday morning. Mr. Dennehy suggested that this showed his state of mind. I do not think that it does. The contract of bailment had come to an end on the Friday when he left the vehicle and, in my view, the act of leaving was complete when he determined his bailment. I do not see how it can be said he

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"left" it there on the Saturday. At that stage, he had no further interest in it, and I cannot see where there was any obligation upon him to do anything about it.

*Information dismissed.*

Solicitors for the defendant: *Gittos, Uren, Wilson, Greig, and Bourke* (Auckland).

### HUGHES v. HAWKE'S BAY COUNTY.

1953. May 20, 27, before Mr. W. A. HARLOW, S.M., at Napier.

*Local Authorities—Care of Roads—Negligence—Standard of Care in Road Construction and Maintenance—Employment of Regular and Recognized Practice.*

The adoption by a local authority charged with the care of roads of a practice in the construction and maintenance of roads which has grown up over the years and which has been generally adopted by highway authorities throughout the Dominion, is the test as to whether reasonable care has been exercised in a particular instance, so long as that practice is neither in breach of any rule of law nor contrary to what is proper to the occasion.

*Wright v. Cheshire County* ([1952] 2 All E.R. 789) applied.

ACTION against a highway authority for negligence in the care of a county road.

During the winter of 1951, heavy rains caused a substantial deposit of clay at a bend in the road to Puketitiri. In the following summer, the defendant Corporation cleared the slip and utilized the spoil to build up the outside edge of the curve in what is called super-elevation. This practically doubled the width of the usable roadway and resulted in an admittedly "good job of the corner". For reasons which were given in evidence and which appeared to the learned Magistrate to be sound enough, the Council's servants did not at once metal the surface of the newly built-up road, but elected to await its consolidation. Neither, however, did they instal signs to give warning of possible danger. In acting and refraining as he did on this occasion, the road-overseer followed a practice which, on the evidence, was current amongst highway authorities in every part of New Zealand.

Fine conditions prevailed for a week or so after this work was done, and the road was safe for all traffic; but, in the night and early morning of December 14, 1951, there were several showers and the newly built-up surface became greasy while rain was actually falling, and remained so for a short time

after each shower. It was during such a time on the morning in question that the plaintiff's heavily laden motor-lorry, in the course of negotiating the outside edge of the curve and on a slight down-grade, slid off the road, overturned, and suffered damage.

The negligence of the defendant corporation was alleged to have consisted of (a) pushing the spoil across the road in such a manner as to render the surface unsafe for traffic, (b) permitting the road to remain in an unsafe condition, and (c) failing to erect signs warning traffic of this condition.

*Alty*, for the plaintiff.

*Woodhouse*, for the defendant.

*Cur. adv. vult.*

HARLOW, S.M. Counsel for the defendant Corporation has properly conceded that, if the evidence should establish negligence on the part of the defendant, then, in the particular circumstances of the case, that negligence would amount to active misfeasance for which the local body could be held responsible in tort; and he will not contend that it was no more than passive non-feasance for which his client Corporation would not be liable: *Stoddart v. Ashburton County* ([1926] N.Z.L.R. 399; [1926] G.L.R. 304).

In my judgment, the evidence falls well short of establishing culpability on the part of the defendant. On any analysis of the situation, negligence will not be established unless the Court finds that the defendant has been guilty of a breach of its duty to exercise reasonable care and skill in the course of its roading operation. I am unable, on the facts, to discover any want of due care or the absence of propriety either in the initial work of removing the slip and turning the debris to account, or in the manner of doing that work, or in leaving the road in the state in which it was that the time of the accident, or in failing to erect warning signs, or indeed, in any other fashion.

It is possible to conceive of cases in which a local authority might become responsible for the consequences of similar operations; but, to found an action of this sort, more would be required than an unbroken surface, with no concealed cavities beneath, which became slippery for heavy traffic under showery conditions. Perhaps I may draw on experience—for twenty years I acted for two county councils in Central Otago where, in comparable circumstances, accidents of this kind were not uncommon. Throughout that time, not one case of this nature reached the Courts; moreover, I cannot recall warning signs, except for a weakened bridge, a damaged culvert, a hole below, or the like. Admittedly, this provides no criterion at all; but, in a generally litigious mining community, repeated failures to prosecute claims for the cost of repairs to motor-vehicles which were damaged on leaving the road may be at least suggestive of what is required by way of basis for a claim of this kind.

I agree that the case cited by Mr. *Woodhouse*, *Wright v. Cheshire County* ([1952] 2 All E.R. 789), is apt to present

consideration. In that case, the English Court of Appeal accepted a regular and recognized technique in a certain operation as providing a reasonable standard of care for its accomplishment. There is certainly strong force in the argument that a practice in the construction and maintenance of roads which has grown up over the years and which has been generally adopted by highway authorities throughout the country, so long as that practice is neither in breach of any rule of law nor contrary to what is proper to the occasion, should pass the test as to whether reasonable care was exercised in a particular instance.

To hold a local authority liable in the premises might well result in retarding road-improvement and in discouraging progress in this direction generally. Furthermore, in my judgment, it would impose an impossible burden on such a body if, in the course of its manifold operations, it was obliged to attain and sustain a standard of care so high that every chain of roadway treated should forthwith be rendered accident-proof under normal conditions, for all types of traffic in all seasons and at all times. Virtually, that is what the plaintiff in this case would seem to require.

Plaintiff is nonsuited with costs to defendant.

*Plaintiff nonsuited.*

Solicitors for the plaintiff: *Gifford and Alty* (Napier).

Solicitors for the defendant: *Lusk, Willis, Sproule, and Woodhouse* (Napier).

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### PAULL v. CLOWES.

1953. June 9; July 1, before Mr. H. JENNER WILY, S.M., at Auckland.

*By-law—Dogs—Offence to keep Three or More Dogs without Licence from City Council—Two Dogs registered in Name of Defendant's Wife, One in Daughter's Name, and Two in Defendant's Name—Defendant Liable for Breach—"Keep".*

The defendant was charged under s. 22 (1) of the Auckland City By-law No. 17 as amended by s. 6 of the By-law No. 35. Subsection (1), as amended, provided that:

"No person shall keep for a period of fourteen days  
"or more on any premises within the City of Auckland  
"three or more dogs of the age of three months or more  
"unless he shall be the holder of a licence for the purpose  
"from the Council."

Subsections (2), (3), and (4) provide for the application for and issue of a licence.

The defendant was the occupier of certain residential premises and his wife and daughter (aged nineteen) lived with him. On the date referred to in the charge, January 5, 1953, there were five dogs, all over three months old, on these premises. These dogs were registered with the City Council: in the name of the defendant's wife, two dogs, one first registered in 1949 and one in 1952; in the name of the defendant's daughter, one dog first registered in 1953 (although she appeared to have had another dog registered in 1952); and in the defendant's name, two dogs first registered in 1953—making in all five dogs on the premises.

On November 25, 1952, the defendant applied to the Council for a licence under the by-law but the application was refused by reason of unspecified objections from neighbouring residents. No objection apparently was taken to the actual premises in which the dogs were kept.

The defendant submitted that he personally kept two dogs only; and that, accordingly, the by-law did not apply to him, as it was limited in its application to the one person as the keeper.

*Held*, 1. That the word "keep" as used by the by-law was wide enough in its ordinary meaning to include a person who has the control of dogs kept, even though they are owned by another person or persons, and who, as the occupier of the premises, must be taken to be in control of those premises, and must assume liability within the meaning and purport to the by-law for any dogs he causes to remain there.

*Police v. Pedersen* ((1942) 2 M.C.D. 363) referred to.

2. That the dogs were under the control of the defendant and were therefore kept by him for the purposes of the by-law, among which is the abatement or control of any nuisance occurring on or emanating from the premises where dogs may be kept; and the defendant had to assume responsibility within the meaning and purport as the by-law for any three or more dogs he caused or allowed to remain or be kept on such premises.

*White v. Jameson* ((1874) L.R. 18 Eq. 303) referred to.

INFORMATION charging the defendant with a breach of s. 22 (1) of the Auckland City By-law No. 17 as amended by s. 6 of By-law No. 53. Subsection (1) as amended provided that:

"No person shall keep for a period of 14 days or more on any premises within the city of Auckland three or more dogs of the age of 3 months or more unless he shall be the holder of a licence for the purpose from the Council."

Subsections (2), (3) and (4) provided for the application for and issue of a licence and subs. (5) exempted certain dogs (cattle dogs) from its application but did not apply to this case.

The facts were not in dispute and were admitted. The defendant was the occupier of certain residential premises and his wife and daughter aged nineteen lived with him. On the date referred to in the charge, January 5, 1953, there were five dogs all over three months old on these premises. These dogs were registered with the City Council as follows:

In the name of Mrs. Clowes, wife of the defendant: two dogs, one first registered in 1949 and one in 1952.

In the name of Miss Clowes, daughter of the defendant: one dog first registered in 1953, although she appeared to have had another dog registered in 1952.

In the name of the defendant: two dogs first registered in 1953, making in all five dogs on the premises.

On November 25, 1952, the defendant had applied to the Council for a licence under the by-law but the application had been refused by reason of unspecified objections from neighbouring residents. No objection apparently had been taken to the actual premises in which the dogs were kept.

*G. P. Hanna*, for the informant.  
Defendant in person.

*Cur. adv. vult.*

WILY, S.M. The defendant submitted that he personally kept only two dogs and that accordingly the by-law did not apply to him as it was limited in its application to the one person as the keeper; and, further, if the by-law did not have such an interpretation, but made him, as the occupier of the premises, liable for all dogs on the premises, then such by-law was unreasonable.

For the informant it was submitted that this by-law is made under powers contained in the Municipal Corporations Act, 1933, ss. 364 (1) (8) and (39) relating to matters of conserving public health and convenience and the registration and licensing of the keeping of animals likely to become a nuisance or injurious to health. Similar powers to make by-laws are also contained in the Health Act, 1920, ss. 67 (1) (a) and (h) for conserving public health and preventing or abating nuisances, and regulating, licensing or prohibiting the keeping of animals. Counsel also cited several authorities in support of the reasonableness of the by-law including *Courtville, Ltd. v. Paull* ([1949] 7 N.Z.L.G.R. 201) and, at the close of the hearing, I held orally, that whether or not the "person" referred to in the by-law included only the owner of the dogs or the occupier of the premises where the dogs were kept, the by-law was not unreasonable or bad under the authority of the Council to make it.

The only issue, therefore, to be now determined is whether or not the defendant as occupier of the premises can be held to "keep" more than two dogs under the by-law.

There is little authority to assist in the interpretation of this by-law. There is no doubt that it is intended to exercise control of the keeping of dogs on any premises for the purpose of abating or preventing any nuisance and conserving public health and convenience. The defendant submits that the words "no person shall keep" must be given their ordinary meaning which would include any one person who had control or custody or possession of the dogs and should not be extended to include an occupier of premises in which other persons may also keep say two dogs each. He refers me to *Police v. Pederson* ((1942) 2 M.C.D. 363) where the word "keeping" of liquor within the meaning of s. 38 of the Licensing Amendment Act, 1910, was under consideration and in which it was held that the word was to be applied in the ordinary sense and customary usage.

Although that case is not really applicable to this case, I do agree with the general principle that words used in a by-law must be applied in their ordinary sense and with their customary usage, having regard to the context and purpose of the by-law in which they are used.

Counsel for the informant referred to the Dogs Registration Act, 1908, but, although the defendant would come within the definition of the word "owner" in s. 23 of that Act with its consequent liabilities, that definition applies only for the purposes of that Act and cannot be applied to the interpretation of this by-law. Even though that Act applies to all dogs, no common usage as to the meaning of keeping could be said to arise by virtue of the effect of the application of that Act in widening the scope of the words used in this by-law. The Act and the by-law have different purposes.

There being no authority statutory or otherwise to help in the interpretation of the by-law, it is, therefore, necessary to consider just what the by-law itself means in its ordinary sense bearing in mind its context and purpose. Both counsel have referred to the definition of the word "keep" in *Webster's New International Dictionary*. This dictionary shows that the word is given many and, in some cases, very wide meanings, but of those it is noted that it may mean "to have the care of" or "to cause to remain in a given place" or "to retain in one's power or possession". These are not unusual meanings of the word. The defendant admits that he is the occupier of the premises in which these five dogs are "kept". He must, therefore, as head of the house, be assumed to have control of the premises. It is not unreasonable to assume that anything, and, in particular, these five dogs, are caused to remain there by him, and, as he owns two of them, with his authority and approval as to the other three. He harbours them, gives them a home; as the breadwinner of the family unit he probably, although I am not informed on this point, contributes to or pays the cost of their food or keep (giving the word "keep" a further but relevant meaning).

It would seem, therefore, that the word "keep" could be wide enough in its ordinary meaning to include a person who has the control of the object kept even though it is owned by another person or persons. I am strengthened in the view in

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this particular case that these dogs are under the control of, and, therefore, kept by the defendant for the purposes of the by-law, when I come to consider the purport of the by-law. It has already been shown that among these purposes is the abatement or control of any nuisance occurring on or emanating from the premises in which dogs may be kept. It is a well-established principle of our law that any occupier of premises may be liable in tort for any nuisance that flows from those premises even when that nuisance is occasioned by acts of other persons whom he brings upon the premises as a licensee, e.g., see *White v. Jameson* ((1874) L.R. 18 Eq. 303). There is no doubt that, as occupier, the defendant must be taken to be in control of these premises, and, in my opinion, he must assume liability within the meaning and purport of this by-law for any dogs he "causes to remain" there. I am satisfied this is a proper interpretation of "keep" for the purposes of this by-law and is not extending the meaning any further than placing the responsibility on the occupier of premises for such dogs of three or more in number caused or allowed by him to remain, or be kept, thereon, and thereby controlling any nuisance, inconvenience or danger to public health so caused to other residents in the City area.

Solicitors for the informant: *Butler, White, and Hanna* (Auckland).

### IN RE HOROWHENUA AGRICULTURAL AND PASTORAL ASSOCIATION'S ASSESSMENT.

1953. September 10; December 14, before Mr. R. M. GRANT, S.M., at Levin..

*Rates and Rating — Urban Farm Lands — Agricultural and Pastoral Association—Occupier of Land within Borough—Such Land grazed when in Previous Ownership and classified as Urban Farm Land on Farm Land List—On Purchase by Association, Such Land removed from List and re-valued for Rating Purposes—Land put down in Permanent Pasture and grazed by Association—Property acquired for Annual Show Purposes—Revenue from Grazing Land not Substantial Part of Income—Land not used by Association "exclusively or principally for agricultural purposes"—Urban Farm Land Rating Act, 1932, ss. 2, 26.*

An Agricultural and Pastoral Association purchased an area of 23½ acres held under Crown lease within a borough, which, at the date of the sale, was urban farmland on the farm-land list, with a special urban farm-land value of £1,360, and attracting £68 17s. 7d. in rates. The Association converted the leasehold into a freehold. The

Borough Council informed the Association that the land had ceased to be urban farm-land, and that it was proposed to increase its value for rating purposes to £4,655, whereon the rates would amount to £232 10s. (This was subject to certain statutory concessions.)

Until January 1, 1953, when possession was given and taken, the previous owner used the land for grazing purposes. From the date on which the Association took possession of it for its own purposes, it closed it up for hay; and the hay, cut in the month following possession, produced a gross income of £135, reduced by expenses to a net profit of £67. The Association thereafter worked up the land and sowed it down in permanent pasture of good English grasses. The Association was grazing the land, and, after consolidation of the pasture, intended to stock it with approximately 100 wethers to be fattened and sold, and thereafter 80 to 100 hoggets or dry sheep would be purchased and would be carried through the winter, shorn in November, and sold as fats in March. This annual sheep-farming programme was anticipated to produce a net profit of between £200 and £250.

In the year ended April 30, 1953, the Association had a gross income of £3,400. It expected to add to its future income an additional £200 to £250 by reason of the grazing and stocking of the land.

On objection by the Association under s. 26 of the Urban Farm Land Rating Act, 1932.

*Held*, 1. That the principal purpose for which the property was acquired was the running of a two-day agricultural show in each year, and the fact that the Association grazed sheep during the year was purely ancillary; that its revenue from such grazing was not a substantial portion of its total income; and, accordingly, the land was not within the definition of "urban farm land" in s. 2 of the Urban Farm Land Rating Act, 1932.

2. That the Association had failed to justify its objection, and its application should be dismissed.

OBJECTION under s. 26 of the Urban Farm Land Rating Act, 1932, to removal of an area of land in the Borough of Levin from the farm-land rating roll.

On June 1, 1952, the Horowhenua Agricultural and Pastoral Association purchased an area of approximately 23½ acres from Mr. C. O. Mark, a farmer of Levin, but did not take possession of the property until January 1, 1953: the above area is situated within the Borough of Levin, and, at the date of sale, was urban farm-land on the farm-land list, enjoying the allocation of a special urban farm-land value of £1,360 and attracting rates by reason of such value in the sum of £68 17s. 7d.

This area was held on a Crown Renewable Lease, and, on October 6, 1952, the Association converted the leasehold into a freehold and became the owner of the fee simple by paying to the Crown the sum of £4,850.

On March 26, 1953, the Association received written advice from the Levin Borough Council that the land had ceased to be urban farm-land and that it was proposed to increase the value thereof for rating purposes to the Government unimproved value of the land, *viz.*, the sum of £4,655; the evidence and exhibits did not reveal the exact mathematical calculation for rates on this valuation, but it would appear that by the removal of this property from the urban farm list the rates on the above valuation at 1s. in the £ on the unimproved value would amount to approximately £232 10s., subject, however, to special statutory concessions which would be referred to later.

The Association contended that the land had, in fact, not ceased to be urban farm-land and that it was being used principally for agricultural and pastoral purposes: until January 1, 1953 (when possession was given and taken), Mr. Mark apparently used the land for grazing purposes and from such date the Association took possession of it for its own purposes and closed it up for hay: the hay was cut in the month following possession and produced a gross income of £135, reduced by expenses to a net profit of £37: the Association thereafter worked up the land and sowed it down in permanent pasture at a cost of approximately £150 for seed and manures and a further £100 for rolling, harrowing, and sowing.

Having put the land down in permanent pasture of good English grasses, the Association was grazing the land and after consolidation of the pasture would stock it with approximately 100 wethers to be fattened and sold; thereafter 80 to 100 hoggets or dry sheep would be purchased and would be carried through the winter, shorn in November and sold as fats in March: the annual sheep-farming programme was anticipated to produce a net profit of between £200 and £250.

The real purpose for acquiring the property was to use it for the Association's annual show at which many hundreds of sheep, pigs, dairy cattle and other farm stock were usually exhibited. The report and balance-sheet of the Association's operations for the year ending April 30, 1953, revealed a gross income approximately £3,400 reduced by a gross expenditure of approximately £2,700: the following were some of the chief items in the income account:—

Subscriptions, £860; gate takings, £605; entry fees, £528; advertising, £267; donations, £255; side show space, £200; pony and pig raffles, £240; total, £2,955. On the expenditure side the main debit items were: Prize money, £860; printing, stationery, and advertising, £510; salary and wages, £475; postages, petty and sundry expenses, £140; donations and subscriptions, £137; and catering, £106; total, £2,228.

The Association enjoyed a membership in excess of one thousand and conducted its show operations in accordance with the usual practice associated with similar gatherings.

*Thomson, for the objecting Association.*

*B. J. Cullinane, for the Levin Borough.*

*Cur. adv. vult.*

GRANT, S.M. [After finding the facts, as above:] In order to retain the special benefits conferred upon urban farm-land which duly qualifies for placing in the farm-land list, the following essentials are indispensable:—

- (a) That the land is subject to general, special or separate rates made or levied by a Borough Council;
- (b) That the land continues to be used exclusively or principally for agricultural, horticultural or pastoral purposes or for the keeping of bees or poultry or other livestock, by a person whose income or a substantial part thereof is derived from the use of the land for any such purpose or purposes;
- (c) That the land is not, in the opinion of the Council, Association, Court or Magistrate dealing with any application or objection under the Urban Farm Land Rating Act, 1932, fit for subdivision for building purposes or is not likely, in such opinion, to be required for building purposes within a period of five years from the date on which such opinion is expressed.

Counsel for the Association contends that, by reason of the grazing and stocking of the property and of the substantial sum produced by these operations, the land should not be removed from this farm-land list; he further contends that the land is used exclusively or principally for agricultural purposes by an organization, whose income, or substantial proportion thereof, is derived from such agricultural and pastoral purposes: in other words, he contends that the Association is farming the land during the whole of the year excepting the few odd days when it is required for the purpose of preparing and conducting its annual show: he further contends that, although there may be other legislative provisions to confer rating privileges upon these organizations, nevertheless, such provisions do not mean that in this case this particular organization is not entitled to the benefit of the Urban Farm Land Rating Act, 1932.

The evidence reveals that this Association in the year ended April 30, 1953, enjoyed a gross income of £3,400: that it expects to add to its future income an additional £200 to £250 by reason of the grazing and stocking of its 23½ acres holding: in my opinion, the principal purpose for which this property was acquired is obviously the running of a two-day agricultural show: the fact that it grazes sheep during the year is purely ancillary. Racing clubs may own properties comprising hundreds of acres in extent and the principal purpose for which such properties are used is obviously the con-

ducting of race meetings and the providing of tracks for training facilities: if, during the year, the bulk of the property be used for grazing purposes, a similar contention would arise that a racing club should have its property placed on the urban farm-land list if such area be subject to Borough rates. It is probable that the odd pounds received from grazing would be a minor portion of the income of any such club.

Assuming that the Association's total income was £3,600, it could not be said that £200 thereof is a substantial portion: in my opinion, the land is used principally for conducting thereon the annual shows from year to year which are usually held over a period of two days each year.

The Association complained that the Borough Council refused to give remission of rates in pursuance of s. 75 of the Rating Act, 1925, which provides as follows:—

“The power to remit rates given by the last preceding section may be exercised in the case of rates on show-grounds vested in or under the control of a registered agricultural and pastoral society, and in the case of rates in respect of lands held by any body of persons exclusively for the purposes of any outdoor sport and not for profit or gain.”

The Borough Council refused remission under this section: it has a discretion so to do: it suggested that the Agricultural and Pastoral Association make application to the Valuer-General for a special valuation pursuant to s. 43 of the Valuation of Land Act, 1951: the relevant portions of this section are as follows:

“Where land is owned or occupied— . . .

“(b) By or in trust for a society incorporated under the Agricultural and Pastoral Societies Act 1908 and used by that society as a showgrounds or place of meeting; . . . and the land is not used for the private pecuniary profit of any individual or individuals, the Valuer-General shall make reduction in the assessment of the capital and unimproved value of the land, and of the several interests therein to the extent by which in his opinion the value is reduced by reason of the limited and restricted purposes to which the land is applied.”

In pursuance of this suggestion, the Association applied to the Valuer-General who made a special valuation of the unimproved value of the land at £2,330, representing one-half of the unimproved Government Valuation: the Association will enjoy a rebate of 50 per cent. on its rates and this would involve approximately £116 per annum in rates instead of £232 per annum had such special valuation not been made: the Association, however, wishes to bring the liability of rates down to £68, representing the amount payable if the land remains on the urban farm list.

The dominant purpose for which the Association is using this property is that of a showground. This would require the erection of stock-yards, administration buildings, stands, catering facilities, conveniences and the other requisite struc-

tures necessary for the operation of a showground: arrangements for side-shows would also be provided.

During the year, it is in keeping with economics and common-sense to run a few head of stock to keep the grass down and to maintain the pastures in decent order: this, however, is not the main purpose of the owner in using this property—it is purely incidental. The Association itself is the occupier, and, in my opinion, the land is not entitled to remain on the urban farm-land list and it has been properly removed therefrom.

Section 26 of the Urban Farm Land Rating Act, 1932, empowers a Council to deal with any property which is included in the farm-land roll if it is of opinion that such property has ceased to be urban farm-land: the Levin Borough Council, acting under its power in that behalf, notified this Association of its intention to increase the special rateable value and within the time specified thereafter the Association objected, and this objection was duly heard before me sitting at Levin on September 10, 1953.

Having heard the objection and having considered the evidence in support thereof, the applicant Association has, in my opinion, failed to justify its objection and such application is accordingly dismissed. Costs £3 3s., are allowed to the Levin Borough Council.

*Application dismissed.*

Solicitors for the Objecting Association: *Harper, Atmore, and Thomson* (Levin).

Solicitors for the Levin Borough: *Park, Bertram, and Cullinane* (Levin).

## WALTERS v. THAMES VALLEY DRAINAGE BOARD.

1952. November 26, before Mr. W. H. FREEMAN, S.M., at Te Aroha.

*Land Drainage—Classification of Land—Land receiving Benefit from Maintenance of Drainage Works—Not Classifiable—“Benefit from the construction of the drainage works”—Land Drainage Act, 1908, s. 33.*

Section 33 of the Land Drainage Act, 1908, gives power to a Land Drainage Board to classify land only when such land is likely to receive benefit from construction of drainage-works.

Consequently, a Board cannot classify land if it is likely to receive benefit from the maintenance, as opposed to the construction, of such works.

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APPEALS under s. 34 (3) of the Land Drainage Act, 1908, in respect of the classification of part of the appellant's lands being, first, 142 acres 2 roods 4.1 perches, Part 1 Lot 1 D.P. 26276 and D.P. 10528 Ngutumanga Block Block XII Waitoa Survey District, and, secondly, 173 acres 30 perches Part 2 D.P. 10528 Ngutumanga Block Block XII Waitoa Survey District.

When the Drainage Board first came into existence, Mrs. Walters owned an area of approximately 397 acres bounded along its western boundary by the Waitoa River. Through the centre of her lands there ran a natural water-course which was roughly parallel with the river and which eventually emptied into the river some distance north of her northern boundary.

Pursuant to the provisions of the Land Drainage Act, 1908, Mr. W. R. Johnston was employed by the Board in the original classification of the property, and he decided that the property had its own drainage system and would not receive any direct benefit from the Board's operations. These operations were designed to lower the level of the Waitoa River itself. He accordingly decided that there was no "A" Class land on her farm. An inspection made by Mr. Johnston in November, 1952, confirmed his original view, and he gave evidence on these appeals accordingly.

Mrs. Walters eventually subdivided her property and sold an area of 71 acres at the southern end. When the Board came to apportion the classification as a result of this sale it classified the remaining 326 acres as follows:

"A" Class 107 acres.

"B" Class 25 acres.

"C" Class 3 acres.

This radical change from the original figures could be justified only by showing: (a) That the original figures were wrong, or (b) That the configuration of the property had in some way altered.

*Trapski* for the appellant.

FREEMAN, S.M. [After stating the facts, as above:]

It appeared at the hearing that the Board's real reason for the alteration of the classification was to recompense itself for money it had expended in clearing a portion at the northern end of the natural water-course.

If this was the reason, then the Board's action was not legal because s. 33 of the Land Drainage Act, 1908, gives the power to classify land only when such land is likely to receive *direct, less direct, or indirect* benefit from *construction* of drainage works. It is the benefit from *construction* as opposed to *maintenance*.

As it is not shown that the Board contemplated any new construction works which would justify the inclusion of such a large area of "A" Class land, and as the evidence of Mr. Johnston was not questioned, the Board's action was obviously wrong.

The appeals will, therefore, be allowed. No costs will be allowed.

*Appeals allowed.*

Solicitors for the appellant: *J. F. Trapski* (Mt. Maunganui).

### McLEAN v. ARCHER.

1954. February 8, 22, before Mr. J. D. WILLIS, S.M., at Dunedin.

*Town-planning—Offences—Building on Section in "Residential district" used by Owner for Storing Goods when Town-planning Scheme came into Operation—Nothing to indicate Building used for Trade Purposes—Tenant later using Section for carrying on Extensive Motor-car and Implement Dealer's Business—Use "not of the same or similar character"—Tenant convicted—Statutes Amendment Act, 1941, s. 71.*

On June 17, 1952, there came into force in the Borough of Mosgiel a "Town-planning Scheme" which had been duly approved by the Town-planning Board pursuant to the provisions of the Town-planning Act, 1926, and its amendments. One M. owned a section in Glasgow Street, Mosgiel, which, under the scheme, was in the "Residential District". When he retired from the business of a grocer (which he had carried on in another part of the town) in 1945, he stored certain chattels, for the sake of convenience, in an old and dilapidated building on the section, his intention being to dispose of them from time to time as opportunity offered. The premises were not opened regularly, perhaps on three or four days a week, and then either in the morning or the afternoon. No sign was erected indicating that the premises were in any way open for trade.

In May, 1953, the defendant became the monthly tenant of the premises, carrying on there a substantial business of buying and selling motor-vehicles and implements, which he stored on the section; and he advertised extensively under the style of the "Taieri Car and Implement Exchange." He was repeatedly warned both verbally and in writing that he was acting in breach of the local Town-planning Scheme in so doing, but he persisted in his action.

Clause 7 of the Mosgiel Borough Town-planning Scheme, so far as material, provided:

"Nothing in the foregoing clause 6 hereof shall apply to any use of land or of an existing building so long as:



"(a) Such land or building is used continuously only for a purpose for which it was lawfully used on the material date. Provided that in this clause 'purpose' means general purposes (*e.g.*, shop as a class), and not the particular purpose (*e.g.*, butcher's shop as distinguished from grocer's shop)."

In this case the material date was June 17, 1952.

The defendant was charged with conducting, in breach of the Town-planning Scheme, the business of a motor-car and implement exchange in an area classed as a "residential district."

*Held.* That there was no resemblance between the purpose for which the defendant was using the premises and that for which it was used by M., as they were not of "the same or a similar character," within the meaning of those words as used in s. 76 (4) of the Statutes Amendment Act, 1941, and neither that section nor the proviso to cl. 7 of the Mosgiel Borough Town-planning Scheme afforded any defence to the defendant.

INFORMATION charging the defendant with a breach of s. 76 of the Statutes Amendment Act, 1941.

On June 17, 1952, there came into force in the borough of Mosgiel a "Town-planning Scheme" which had been duly approved by the Town-planning Board pursuant to the provisions of the Town-planning Act, 1926, and its amendments. This scheme reserved certain areas for residential, and others for commercial and industrial, purposes.

One Mitchell owned a section in Glasgow Street, Mosgiel, which, under the scheme, was in the "residential district". When he retired from the business of a grocer (which he had carried on in another part of the town altogether) in 1945, he had in hand certain goods and chattels which for the sake of convenience he stored in an old and dilapidated building on this particular section. This building had at one time been a bacon curing factory, but was by this time in a state of disuse and in a filthy condition, being, indeed, described by the defendant himself in a letter of May 20, 1953, to the Town-planning Board, as "an eyesore which I intend to demolish." The section itself was a dumping ground for "junk" of all kinds. The goods and chattels were insured for the sum of £50 only, and Mitchell's intention was to dispose of them from time to time as opportunity offered. Some of the goods, such as lime, cement, and grain, being of a perishable nature, were no doubt sold at once; at any rate, there was nothing of any exceptionable value remaining on the premises by June, 1952. The goods in question were simply in the nature of remnants left over to Mitchell after the sale of his own business and which he was getting rid of as best as he could over the years. The premises were not opened regularly, perhaps on three or four days a week and then not all day but only in either the

morning or the afternoon. In July, 1952, Mitchell ceased to live in Mosgiel and from then until May, 1953, paid infrequent visits to the Glasgow Street section. Between 1945 and 1952, his average yearly sales amounted to the somewhat inconsiderable sum of £10-£15. No sign was erected indicating that the premises were in any way open for trade. Tax returns from these odd sales ceased to be made in 1951.

In May, 1953, the defendant became, and still continued to be the monthly tenant of the premises, carrying on there a substantial business of buying and selling motor-vehicles and implements, which he stored on the section, and advertising extensively under the style of the "Taieri Car and Implement 'Exchange.'" He was repeatedly warned both verbally and in writing that he was acting in breach of the scheme in so doing, but he had persisted in his action.

Anderson, for the informant.

Neil, Q.C., for the defendant.

*Cur. adv. vult.*

WILLIS, S.M. [After stating the facts, as above:]

On August 3, 1953, after various correspondence had passed between the Town Clerk and the defendant, the latter's solicitors replied to a letter written to him by the Council's solicitors threatening proceedings, that "to comply with the Town-Planning Scheme our client is now negotiating to obtain business premises in the commercial area and will do so within 'a very short time.'" This is a rather tacit acknowledgment that the defendant recognized that he was acting in breach of the Scheme, but, in any event, the statement of his intention was quite untrue, because, without any further explanation or discussion, the defendant remained where he was. The result is, that an information has been laid against him, alleging, in effect, that, in breach of the Scheme, he is conducting the business of a motor-car and implement exchange in an area classed as a "residential district". For the defendant, it is submitted shortly, that the premises had always been continuously used for commercial purposes by Mitchell, and that the defendant is merely continuing to use them for the same general purpose.

Clause 6 of the Scheme provides generally for compliance with the scheme, and then cl. 7 provides, so far as is material, that:

"Nothing in the foregoing clause 6 hereof shall apply to 'any use of land or of an existing building so long as: (a) 'Such land or building is used continuously only for a purpose for which it was lawfully used on the material date [in this case June 17, 1952], Provided that in this clause 'purpose' means general purpose (e.g., shop as a class), 'and not the particular purpose (e.g., butcher's shop as distinguished from grocer's shop).'"

The submission made on behalf of the defendant amounts, then, to this, that the premises were as at June, 1952, and, indeed, up to May, 1953, used by Mitchell for the purposes of

trade—namely the sale of merchandise and goods, and that since that date they have been used by the defendant for the same general purpose, that is, the sale therefrom of motor-vehicles and implements, and consequently the defendant has brought himself within the above proviso to cl. 7. I do not think that I can accept this submission. Mitchell used the building on the section purely as a storing place for remnants which he sold over the years when he could find purchasers. The place was not advertised in any way and as I have said had no business signs erected over it. There is, in my opinion, no connection between the purpose for which Mitchell used the premises and that for which they are now used by the defendant, and, consequently, I do not think that the proviso to cl. 7 assists the defendant. Any scheme must make provision for the matters referred to in the Schedule to the Town-planning Act, 1926, and for fifteen years there were no statutory provisions relating to a failure to comply with a scheme. This state of affairs was remedied, however, by the Statutes Amendment Act, 1941, s. 76 (1) of which now provides the general penalty for non-compliance with a scheme, this being repeated in substance (though quite unnecessarily) in cl. 45 of the Scheme now under consideration. Then s. 76 goes on to provide as follows:

“(3) Nothing in this section shall apply in relation to  
“an existing use of any building or land . . .

“(4) For the purposes of this section, the term ‘existing  
“‘use’, in relation to any building or land, means a use  
“of that building or land for any purpose of the same  
“character as that for which it was last used before the date  
“on which the scheme came into force or of a similar  
“character . . . .”

These last statutory provisions appear to be to the same general effect as those of cl. 7 of the scheme, already quoted. In the event of a conflict, the former would, of course, prevail over the latter as they are imported into every scheme under the principal Act, including the Mosgiel one. Section 76, as applied to the present case, simply means that there is no breach of the scheme if the premises have been used by the defendant since May, 1953, for any purpose of the same or a similar character as that for which they were used by Mitchell as at June 17, 1952. For the reasons which I have already mentioned, there is no resemblance between the purpose for which the defendant is using the premises and that for which it was used by Mitchell: the purposes are not of “the same or “a similar character.” The former is actively conducting thereon a substantial used car and allied business, this involving the regular buying and selling of motor-vehicles and implements, and the latter was, in fact, not conducting any regular business there at all. He was merely storing a limited quantity of oddments in virtually abandoned premises, making infrequent and spasmodic sales of a somewhat minor nature as opportunity offered to clear the premises.

In the result, therefore, I am of opinion that neither the proviso to cl. 7 of the scheme, nor s. 76 of the Statutes

Amendment Act, 1941, affords any defence to the defendant, who is avdoringly convicted.

It may be desirable to point out that the existence of the Town and Country Planning Act, 1953, has not been overlooked, but this did not come into force until February 1, 1954, and so is not applicable to the present case.

*Defendant convicted.*

Solicitors for the informant: *Webb, Allan, Walker, and Anderson* (Dunedin).

Solicitors for the defendant: *McAlevey and O'Neill* (Dunedin).

**BLUE STAR TAXIS DUNEDIN, LIMITED,  
v. DUNEDIN CITY CORPORATION.**

1954. March 11, 23, before Mr. J. D. WILLIS, S.M., at Dunedin.

*Municipal Corporations—Unlighted Obstruction in Street undergoing Repair—Duty of Local Authority under Statute and at Common Law—Effect of Overhead Street-lighting in Vicinity considered—Municipal Corporations Act, 1933, s. 178.*

*Limitation of Action—Notice given to Local Authority, under Repealed Provision, after Passing of Limitation Act, 1950—Notice sufficient for Purposes of that Statute—Local Authority not prejudiced by Delay of Sixteen Weeks in giving Notice—Limitation Act, 1950, s. 23 (1) (2).*

It is the duty of a municipal corporation, under s. 178 of the Municipal Corporations Act, 1933, to take sufficient precautions to prevent accidents during the construction and repair of any street, and to cause any such dangerous place to be sufficiently lighted by night. In any event, there is a duty on the part of such authority to take reasonable steps to prevent the obstruction's becoming a danger to users of the road. The failure to observe the obligation is, *prima facie*, negligence.

*Fisher v. Rukslip-Northwood Urban District Council and County Council of Middlesex* ([1945] 2 All E.R. 458) followed.

Where such an obstruction is unlighted by night, the mere fact that there is overhead street lighting at the time of an accident caused by collision with the unlighted obstruction does not release the local authority responsible for the obstruction from anything further being done by

way of warning to the public. The street lighting would require to be so effective and so clear that anybody driving along the highway with due care and attention would find the obstruction so illuminated as not to be a danger to users of the highway.

*Whiting v. Middlesex County Council* ([1947] 2 All E.R. 758) followed.

A notice given to a municipal corporation on July 17, 1953, in respect of an accident on March 31, 1953, under s. 361 of the Municipal Corporations Act, 1933 (which was repealed by s. 35 (2) of the Limitation Act, 1950, which came into force on January 1, 1952) was sufficient for the purposes of the new Act; and the defendant corporation had not been materially prejudiced by the delay of sixteen weeks in the sending of the notice.

ACTION for damages based on negligence. By its statement of claim, the plaintiff alleged that one of its taxi-cabs had collided at night with an unlighted notice board erected by the defendant on the main north road, suffering damage as a consequence. Upwards of four months later, by its amended statement of claim, it alleged that the taxi had swerved to avoid the unlighted notice board and struck a telegraph pole.

*R. J. Gilbert*, for the plaintiff.

*A. N. Haggitt*, for the defendant.

*Cur. adv. vult.*

The facts sufficiently appear from the judgment.

*WILLIS, S.M.* The accident occurred on March 31, 1953, notice of intention to bring an action being given on July 17, 1953. It was contended on behalf of the defendant that this notice was ineffective as not complying with s. 23 (1) (a) of the Limitation Act, 1950, in that it was not given "as soon as practicable" after the accident. It is, therefore, necessary at the outset to give consideration to this preliminary objection.

The somewhat remarkable notice served on the defendant was purported to be given pursuant to the Municipal Corporations Act, 1933, and obviously by virtue of s. 361 of that Act. Apparently no attempt was made to ascertain whether the section was still in force, and, of course, it was repealed by the Limitation Act, 1950, which came into force on January 1, 1952, that is, eighteen months before the giving of the notice. The new Act consolidates and amends the general Acts which dealt with the limitation of the main classes of civil actions and a number of other enactments which prescribed special periods of limitation for special classes of actions. It follows substantially the Limitation Act, 1939, (2 & 3 Geo. 6 c. 21) and s. 23 (1) (a) so far as material, provides that in the case of actions against the Crown and public authorities.

"Notice in writing giving reasonable information of the circumstances upon which the proposed action will be based

"(must be given) . . . by the prospective plaintiff to the prospective defendant as soon as practicable after the "accrual of the cause of action."

It is not unimportant to notice that s. 23 (1) (a) is peculiar to New Zealand—there is no corresponding subsection in the United Kingdom Act.

The object of the notice required by the Limitation Act is clearly to give a prospective defendant an early opportunity of investigating the facts. When these are more or less immediately apparent to the plaintiff, no personal injuries are suffered by him to prevent his taking legal advice, and the defendant has no knowledge of the event, then, in my opinion, "as soon as practicable" must be interpreted to mean that the statutory notice must be given quickly to enable the prospective defendant also to inquire into the matter. All this was the position in the present case. All the facts being immediately in the possession of the plaintiff, and the defendant being even unaware of the accident, there was no real reason for the delay of sixteen weeks in the sending of the notice and for the first time thereby advising the defendant of what had occurred.

What I have said as to the necessity for giving early notice of intention to bring proceedings is, however, subject to an important qualification—if it can be shown that a prospective defendant has not been materially prejudiced by delay in the giving of notice, then I think that the technical objection should not prevail. Now, in the present case, it was apparent to the defendant, after receipt of the particular notice on July 17, 1953, that the main issue would be whether the notice board was lighted up or not; and that to establish the position it would be necessary to brief the evidence of the ganger, Scholes, and his two assistants, Tapp and Peterson. The delay on the part of the plaintiff in issuing the notice, was, however, equalled by the diffidence the officers of the Corporation apparently felt in interviewing these men; Scholes emphatically reiterated that he was first approached in October or November (three or four months after the receipt of the notice), Tapp stated he was seen after Christmas (at least five months after its receipt), and Peterson was not seen until two weeks before the hearing (eight months later). In these circumstances, it is difficult to appreciate how the defendant was materially prejudiced by the alleged delay, when it took so long to obtain statements from its own very material witnesses. Moreover, it was not until the amended statement of claim was filed that the defendant came to the conclusion that it had been prejudiced and so should formally plead this defence. In fact, no new main or difficult issues were raised by the amended claim, it remaining obvious that the main question still would be whether the notice board had been lighted or not. In the result, although the notice was given under a repealed Act, it was still sufficient, in the normal way, for the purpose of the new Act, and, in the circumstances, I am further of opinion that, even assuming that it could have been given earlier, the defendant has not been materially prejudiced and this technical defence must fail.

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Dealing now with the case on its merits; the short facts are, that the defendant found it necessary to tar-seal the road in question, and then to erect notice boards at regular intervals warning motorists to reduce speed along the affected portions. These notice boards were of a substantial nature placed on trestles straddling the centre of the road, but leaving room on either side for traffic. The plaintiff's driver says that he was proceeding down the road at about 11 p.m. in the normal way with his lights dipped so as not to inconvenience some on-coming traffic, when there suddenly loomed up in front of him, ten or fifteen feet away, the particular notice board, quite unlighted. He swerved to the left to avoid it, then to the right, and being in heavy metal skidded and hit a telegraph post, his car being severely damaged. Section 178 of the Municipal Corporations Act, 1933, provides that

"The Council shall take sufficient precautions to prevent accidents during the construction or repair of any street . . . and shall cause any such dangerous place to be sufficiently lighted by night".

Lighting in a case such as the present one has been deemed by the Legislature to be the obvious and simplest measure of precaution during the hours of darkness. In any event, there would be a duty on the part of the defendant to take reasonable steps to prevent the obstruction from becoming a danger to users of the road: see generally as to this, *Fisher v. Rutship-Northwood Urban District Council and County Council of Middlesex* ([1945] 2 All E.R. 458.) The failure to observe the obligation would clearly *prima facie* amount to negligence.

On the evidence, and without reviewing it in detail, I have no difficulty whatever in finding that on the night of the accident the notice board in question was unlighted. Some hours earlier, the witness Dick was driving along the same stretch of road with his lights full on, and yet barely avoided colliding with it because it was unlighted; while the witness Duff confirmed that there were no lights showing immediately after the accident, adding that this state of affairs existed two nights previously. Many of the relevant English cases were decided when there were restrictions on public lighting and during "black-outs". Along this particular road there was overhead lighting at the time of the accident. I find, however, that the effect of street lighting in this type of case was discussed somewhat recently by *Croom-Johnston, J.*, in *Whiting v. Middlesex County Council* ([1947] 2 All E.R. 758) which was not cited to me. Adopting and adapting the language of his Lordship at p. 760, I do not think that the mere lighting of overhead street lamps in the present case released the defendant responsible for the erection of this substantial notice board from anything further being done by way of warning to the public. The street lighting would require to be so effective and so clear that anybody driving along the highway with due care and attention would find the notice board duly illuminated. In my opinion, this requirement was not fulfilled in the present case. That the notice was not sufficiently illuminated is corroborated by the fact that Dick also narrowly escaped colliding

with it earlier the same evening. But I think that the most cogent evidence as to the necessity in the particular circumstances for having it, too, adequately lit, even although there was overhead lighting, was supplied by one of the defendant's own engineers, who fairly admitted in cross-examination that it was "reasonable that it should be lighted". This, in my opinion, finally disposes of the matter in favour of the plaintiff, the defendant being clearly guilty of negligence in failing to perform its obligation to give due warning of the obstruction.

Judgment is accordingly for plaintiff for the amount claimed, £134 5s.

*Judgment for the plaintiff.*

Solicitors for the plaintiff: *Stevens and Gilbert* (Dunedin).

Solicitors for the defendant: *Ramsay, Haggitt, and Robertson* (Dunedin).

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### HAY v. HUTT VALLEY MILK TREATMENT CORPORATION, LIMITED.

1954. March 29; April 6, before Mr. A. A. McLACHLAN, S.M., at Wellington.

*Nuisance—Noise—Noise from Milk-treating Premises in Early Hours of Morning—Interference with Nearby Property-owner's Comfort and Health—Award of Damages—Perpetual Injunction against Loading Milk-crates during Night Hours—Magistrates' Court Act, 1947, s. 41.*

The plaintiff alleged that the defendant, a milk-treatment corporation, by its servants, workmen and invitees, in the early hours of the morning, between 3 a.m. and 7 a.m., greatly disturbed him and his family in their repose by the noisy starting and stopping of vehicles, the clanging of milk trays over a steel floor, and the loading of such crates on to trucks and the banging of doors, etc., to such an extent that the plaintiff had suffered greatly from loss of sleep and had even had to seek medical advice, and that his property had diminished in value as a result of its proximity to the nightly disturbance.

The plaintiff claimed £25 as damages for interference with his comfort and enjoyment of his rights of property at Council Road, Lower Hutt, and an injunction against the defendant corporation enforcing it to desist permanently from committing the nuisance of interfering with the comfortable and healthful enjoyment of the premises occupied by him.



*Held*, 1. That the plaintiff had established a nuisance interfering with his comfort and health.

*McKelvey v. Invercargill Milk-supply Co., Ltd.* ([1928] 223; [1928] G.L.R. 245), *Fanshawe v. London and Provincial Dairy Co.* ((1888) 4 T.L.R. 694) and *Bloodworth v. Cormack* ([1949] N.Z.L.R. 1058) followed.

2. That, having regard to the discretionary nature of an injunction and to the conditions under which the remedy should be allowed, the plaintiff was entitled to the maximum relief which the Court had power to decree; and, in consequence, he should be awarded the sum of £10 as damages in respect of loss of comfort only, and, in addition, orders should be made that the defendant corporation be restrained in perpetuity from carrying on the business of loading crates of milk bottles between the hours of 9.30 p.m. and 6.30 a.m. at its premises in Council Road, Lower Hutt, as from May 1, 1954.

ACTION in which the plaintiff claimed from the defendant corporation the sum of £25 as damages for interference with his comfort and enjoyment of his rights of property at Council Road, Lower Hutt, and an injunction against the defendant, a milk treatment corporation, enforcing it to desist permanently from committing the nuisance of interfering with the comfortable and healthful enjoyment of the premises occupied by him.

*L. G. Rose*, for the plaintiff.

*W. R. Birks*, for the defendant corporation.

*Cur. adv. vult.*

MCLACHLAN, S.M. The action is brought in terms of s. 41 of the Magistrates' Courts Act, 1947. which gives to that Court a similar general ancillary jurisdiction to that exercised by County Courts in England in terms of s. 71 of the County Courts Act, 1934 (24 & 25 Geo. 5 c. 53).

The provisions are similar, our s. 41 being modelled on the English section and in the following terms:

"41. Every Magistrate's Court. as regards any cause  
"of action for the time being within its jurisdiction, shall  
"subject to the provisions of section fifty-nine of this Act)  
"in any proceedings before it—(a) Grant such relief, redress,  
"or remedy, or combination of remedies, either absolute or  
"conditional; and (b) give such and the like effect to every  
"ground of defence or counterclaim equitable or legal, as  
"ought to be granted or given in the like case by the Supreme  
"Court and in as full and as ample a manner."

Section 59 is the clause dealing with equity and good conscience where value of property or amount of money claimed does not exceed £50.

This relief, as also ancillary relief by way of declaration, is generally not granted in the absence of a money claim within the jurisdiction of the Court: *R. v. Cheshire County Court Judge* ([1921] 2 K.B. 694); *Simpson v. Crowle* ([1921] 3 K.B. 243); and *De Vries v. Smallbridge* ([1928] 1 K.B. 482).

In the last case, however, *Eve J.*, based his decision on the fact that the equitable relief claimed was outside the jurisdiction of the County Court, s. 52.

Although in *R. v. Cheshire County Court Judge* ([1921] 2 K.B. 694), the Court of Appeal held that a money claim must be the subject of the plaint and particulars, in *McDonald and Spratt v. Barnes*, ([1951] 101 L. Jo. 667), it was decided that the question of whether a plaintiff can establish his claim to damages is a matter to be decided at the hearing, and the current practice in England is to allow a plaintiff to amend by asserting an appropriate sum within the jurisdiction.

All acts which a common-law Court, or a Court of Equity, could formerly restrain by injunction can now be restrained. But the English Judicature Act, gave no power to issue an injunction in a case in which no Court had power, before that Act, to give any remedy.

Where it is only the combined actions of two or more persons (as in the present case it may possibly be) which constitutes a nuisance, the plaintiff may sue any one or all of such persons contributing to the nuisance.

The Court has no jurisdiction to grant an injunction where there is no legal injury done, but simply inconvenience caused nor has it ever where legal injury is merely threatened; unless the plaintiff's rights will be thereby invaded.

To constitute the tort of nuisance, which is one of the commonest instances where damages are an inadequate remedy and consequently an injunction is frequently granted, there must be: (a) a substantial interference with the comfort or convenience of persons occupying or using the premises affected by the noise etc., and (b) Some physical injury to the persons: see *Kerr on Injunctions*, 6th Ed. 188 et seq. and *Salmond on Torts*, 11th Ed. 247 et seq.

In the case before the Court, the allegation is that the defendant corporation, by its servants, workmen or invitees, in the early hours of the morning, between 3 a.m. and 7 a.m., greatly disturbs the plaintiff and his family in their repose by the noisy starting and/or stopping of vehicles, the clanging of milk trays over a steel floor, and the loading of such crates on to trucks and the banging of doors, etc., to such an extent that the plaintiff has suffered greatly from loss of sleep and has even had to consult medical advice, and that his property has diminished in value as a result of its proximity to the nightly disturbance. He is supported in his contention by a widow who also resides in the vicinity and whose small daughter of seven years and herself are also subject to grave discomfort as a result of the noises. Evidence provided by a tape-recording machine was admitted as to the continuity but not as to the intensity of the noises after other evidence had established a *prima facie* case of nuisance against the defendant corporation.

For the defence, it was argued that the milk treating and storage operations were necessarily carried out on the particular premises in Council Road, that it had acquired the business as a private company from their predecessors less than a year ago, that the corporation intended moving the milk treatment business to Taika in about sixteen months'

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time and that all care was taken in the handling of bottles, trays, etc., and all instructions re squealing of brakes and closing of doors, etc., were given to drivers to assure the minimum of noise and disturbance.

None of these factors, is, of course, any defence to an action for nuisance, unless the defendant is a statutory authority empowered to commit the nuisance and then, of course, only if it is acting in the only way possible and committing the minimum of disturbance.

It does not matter when the plaintiff's rights of comfort, health, or property are being considered, how important is the task the defendant is carrying on; or what use he is making of his property, if it constitutes a nuisance, save in so far as the nature of the locality, whether industrial or residential, may be of considerable importance. As was stated long ago in the famous English case of *Fanshawe v. London and Provincial Dairy Co.* (1888) 4 T.L.R. 694 by Kekewich, J., where the clanging of milk cans on the pavement at nights and in the early mornings, was the main subject of complaint, the main question was one of fact before his Lordship, sitting as a jury, but he had, as it were, to direct himself on certain points. "A nuisance was complained of "in two grounds—(1) the interference with personal comfort; (2) injury "to property."

In that case, as in the present, no reliable evidence was adduced as to the second ground, which was said to be subordinate to the first (although *Salmond* puts injury to property before interference with comfort and health.) Kekewich, J., goes on to ask: "What sort of "interference with personal comfort was it necessary for the plaintiffs "to show?" (*ibid.*, 694).

To use the words of *Knight Bruce*, V.-C., in *Walter v. Selfe* ((1851) 4 De G. & Sm. 315; 64 E.R. 849) it must be an interference "with the "ordinary comfort physically of human existence, not merely according "to elegant or dainty modes and habits of living, but according to plain "and sober and simple notions among the English people" (*ibid.*, 322; 852).

That a man electing to live in a metropolis must be taken to have submitted to certain annoyances from which he would have been free in the country is clear from the decision in *St. Helen's Smelting Co. v. Tipping* ((1865) 35 L.J.Q.B. 66). It is no answer to say that the plaintiff has come to the nuisance—that doctrine has been exploded, but they had come to a city of noises!

No injunction was granted in this case for, although considerable annoyance and inconvenience was established, a nuisance interfering with the comfort of the plaintiff materially was not shown and so judgment was entered for the defendant with costs, but the same eminent Judge came to a different conclusion in the other milk-can case of *Tinkler v. Aylesbury Dairy Co., Ltd.* (1888) 5 T.L.R. 52).

There is an interesting New Zealand case in which all the authorities were quoted and recorded, viz., *McKelvey v. Invercargill Milk-supply Co., Ltd.* [1928] N.Z.L.R. 223; [1928] G.L.R. 245; also the recent Auckland case of *Bloodworth v. Cormack*, decided by *Callan, J.*, [1949] N.Z.L.R. 1058 in both of which cases the law is very fully set out.

In the former case of *McKelvey*, there were interesting features which suggest the proper approach to the case under review.

Here, however, the noises of milk cans and bottles occurred in the day time and not between 3 a.m. and 6 a.m.

Counsel for the plaintiff referred to *17 Halsbury's Laws of England*, 2nd Ed. 232, as to the inadequacy of damages as a remedy and quoted

the well-known case *Bootes v. Staples and Co.* ([1916] S.L.R. 530); *Clark v. Sloane* ([1923] N.Z.L.R. 1129; [1923] G.L.R. 267) the well-known English case of *Rushmer v. Polsue and Alfieri Ltd.* ([1906] 1 Ch. 234).

By way of defence it was urged that regard must be held to all the circumstances: locality, reasonable use of premises, etc., and the case of *Fanshawe v. London and Provincial Dairy Co.* (1888) 4 T.L.R. 694, already referred to, was relied on as authority for the refusal to grant an injunction.

In deciding the issue, *Stringer, J.*, applied the law as laid down by *Warrington, J.*, in *Rushmer's* case ([1906] 1 Ch. 234) and as approved by the Court of Appeal and the House of Lords.

The interlocutory order was confirmed and made perpetual, but no injunction was ordered in addition thereto and no damages were allowed as in *Clark v. Sloane* ([1923] N.Z.L.R. 1129; [1923] G.L.R. 267). The plaintiff was, however, allowed costs £6 6s. in respect of the interim order.

Having regard to the discretionary nature of an injunction and to the conditions under which the remedy should be allowed, and following particularly the cases above referred to of *McKelvey v. Invercargill Milk-Supply Co., Ltd.*, *Fanshawe's* case, *Bloodworth's* case and the various authorities cited above, it seems abundantly clear that the plaintiff, having established a nuisance interfering with his comfort and health, is entitled to the maximum relief which the Court has power to decree, having regard to the maxim *Sic utere tuo ut alienum non laedas*, in all its aspects and the Court in consequence awards the plaintiff the sum of £10 damages in respect of loss of comfort only and orders in addition that the defendant corporation be restrained in perpetuity from carrying on the business of loading crates of milk bottles between the hours of 9.30 p.m. and 6.30 a.m. at its premises in Council Road, as from May 1, 1954.

This may necessitate a reorientation of the existing system of distribution or even an alteration of the by-laws dealing with the delivery of milk in bottles to individual residents or to schools, or both, but keeping in mind the two-way application of the above maxim, it need not render the defendant corporation's premises unusable and afford a reasonable measure of relief to the plaintiff with the minimum loss to the defendant, as indeed an injunction in all the circumstances of the case ought to do.

The plaintiff is allowed costs amounting to £10 10s. with disbursements £2 and witnesses' expenses £2 8s.

*Judgment for the plaintiff and order for injunction in terms of judgment.*

Solicitors for the plaintiff: *Macalister, Mazengarb, Parkin, and Rose* (Wellington).

Solicitors for the defendant corporation: *Luke, Cunningham, and Clere* (Wellington).

## POLICE v. SARNEY.

1954. May 31; June 9, before Mr. S. L. PATERSON, at Hamilton.

*Transport—Offences—Parking Motor-car in Manner as to impede Traffic—Vehicle not stopped as Close as Practicable to Near Edge of Roadway—Test as to whether Car Parked “as close as is practicable to the near edge of the roadway”—“Practicable”—Police Offences Act, 1927, s. 3 (w)—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 4 (7) (j)—Traffic Regulations, 1936, Amendment No. 1 (Serial No. 1939/76), Reg. 4.*

The test as to whether or not the stopping or parking of a motor-vehicle was “as close as is practicable to the near edge of the roadway” (in terms of Reg. 4 (7) (j) of the Traffic Regulations, 1936) depends on whether or not it was reasonable for the motorist concerned to park outside-parked bicycles, or whether the distance to which such parked bicycles forced him back from the kerb would make his parking there so unreasonable as to say that it was not practicable for him to park any closer. Each case must be decided on its own circumstances.

*Potter v. Neave* ([1944] S.A.S.R. 19) applied.

On a busy Friday night in a city street, several cars, including the defendant's car, were parked outside the line of angle-parked cars, and were obstructing the traffic. The defendant's car was parked outside a cycle stand. There was a conflict of evidence as to the position of the cycle stand.

The defendant was charged with two offences (1) under s. 3 (w) of the Police Offences Act, 1927, with obstructing a public place by parking a motor-car therein in such a manner as to impede traffic; and (2) with being the driver in charge of a motor-vehicle he did stand or stop such vehicle other than as was practicable to the near edge of the roadway, contrary to the Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 4 (7) (j) (added by Amendment No. 1 (Serial No. 1939/76), Reg. 4).

*Held*, 1. That, having regard to the words of s. 3 (w) of the Police Offences Act, 1927, and also to the various provisions contained in Reg. 4 (7) of the Traffic Regulations, 1936, the defendant's action did not constitute an offence under s. 3 (w).

2. That, having regard to the evidence and particularly the conflict of evidence as to the position of the cycle stand, it had not been proved that there had been a breach of Reg. 4 (7) (j).

INFORMATION charging the defendant with two offences: (1) Under s. 3 (w) of the Police Offences Act, 1927, with obstructing a public place by parking a motor-car therein in such a manner as to impede traffic; and (2) with being the driver in charge of a motor-vehicle he did stand or stop such vehicle other than as close as was practicable to the near edge of the roadway contrary to the Traffic Regulations, 1936 (Serial No. 1936/84). Reg. 4 (7) (j) (added by Amendment No. 1 (Serial No. 1939/76), Reg. 4).

The evidence shows that on the date charged, which was a busy Friday night, two Police officers in a patrol car saw several vehicles parked outside the line of parked cars in Victoria Street, Hamilton. These cars were obstructing the flow of traffic. There were in all five cars concerned, the defendant's car being the second in line. The Police officers were able to find the owners of the other four cars which were removed, but could not find the defendant. The other four cars were parked outside the line of angle parked cars, but the defendant's car was parked outside a cycle stand. There was a conflict of evidence as to how far out from the kerb the cycle stand was placed.

Constable Martin said he thought there were bicycles parked on each side of it but he was uncertain. The defendant on the other hand asserted positively that the cycle stand was against the kerb.

*Murray*, for the defendant.

*Cur. adv. vult.*

PATERSON, S.M. Mr. *Murray* raises two defences: (1) That the defendant's car did not protrude further into the roadway than the angle parked cars on either side and, therefore, was not an obstruction to the traffic; and (2) that the car was in fact parked parallel with the direction of the roadway and with the left side as close as was practicable to the near edge of the roadway.

Now the first charge is easily disposed of. It is brought under s. 3 (w) of the Police Offences Act, 1927, which reads:

"Every person is liable to a fine not exceeding £10 who  
"rolls any cask, beats any carpets, flies any kite, uses any  
"bows and arrows, or catapult, or shanghai, or plays at any  
"game to the annoyance of any person in any public place,  
"or obstructs any public place whether by allowing any cart  
"or animal to remain across such public place, or by placing  
"goods thereon or otherwise."

Under the circumstances, I think it would be stretching the language of this section to bring the defendant within its four corners. I must not be taken as ruling that in no case does the parking of a motor-vehicle amount to an offence under the section. That would be a question of pure fact, but, having regard to the words of the section and also to the various provisions contained in Reg. 4 (7) of the Traffic Regulations, 1936, the defendant's actions did not constitute an offence under that section.

I am not satisfied on the evidence that his car was an obstruction. He asserts that it was parked so that the off-side did not protrude any further than the backs of the angle parked cars. The Constables, I think, had in mind more the obstruction which was caused by the other vehicles at either end of it which were parked outside the line of parked cars. Constable Martin said that it protruded about 15 feet into the roadway and that would be about the same distance as the average motor-vehicle when angle parked. That information will, therefore, be dismissed.

The second information is laid under Reg. 4 (7) of the Traffic Regulations, 1947 (Serial No. 1947/44). This provides:

"4. (7) No person or driver in charge of any vehicle  
"not being a bicycle shall stop, stand, or park such vehicle  
"whether attended or unattended in any of the following  
"places or positions."

Then follows some nine prohibited positions, most of which are irrelevant to this prosecution.

It should be noted, however, that the only reference to obstruction is in subcl. (d) which refers to parking close to corners, safety zones, intersections, etc. Subclause (e) relates to parking where a notice, traffic sign or marking or sign on the roadway is maintained by a controlling authority indicating that the stopping, standing or parking of vehicles is prohibited or restricted except in conformity with the terms of such prohibition or restriction. There is no evidence that there was opposite the cycle stand any such marking or sign. Subclause (h) prohibits parking or stopping a vehicle so that any other stopped vehicle not being a bicycle is located between the vehicle and the nearest edge of the roadway. The defendant is not charged under this clause, which would not be applicable because the only vehicles located between the defendant's vehicle and the nearest edge of the roadway were bicycles.

Subclause (j) prohibits parking otherwise than parallel with the direction of the roadway and with the left side of the vehicle as close as is practicable to the near edge of the roadway. This is the clause on which the prosecution relies. Before considering it in detail, I would just refer to para. (k) which refers to areas marked as reserved for the stand of the vehicles. It will be observed that there is no prohibition from parking a motor-vehicle outside a bicycle stand because a bicycle is specially exempted under para. (h).

The question arises as to whether when a vehicle is prevented from getting any closer to the nearest edge of the roadway by the presence of a bicycle and is stopped or parked as close to the edge as the bicycle will permit, it can be said to be parked otherwise than as close as practicable to that edge. In one sense, it could be said that, if the presence of a bicycle prevents it from stopping as close to the edge as it could stop if the bicycle were not there, then, if it were stopped as close to the edge as the bicycle will permit, it is stopped as close to the edge as is practicable. It is probable that, if there were an available parking space within a reasonable distance and instead of occupying that parking place a motorist chose to

stop outside a bicycle standing a few feet from the kerb, he would not be stopping as close as was practicable.

The word "practicable" is, I think, a word of variable meaning which must take its meaning from the surrounding circumstances. In as much as the Reg. (para. (h)) excludes a bicycle from the meaning of a stopped vehicle located between the parked vehicle and the edge of the roadway, it might be said that a vehicle parked as close as was possible having regard to the intermediate position of a bicycle was parked as close as practicable to the nearest edge of the roadway.

The *Oxford English Dictionary* defines "practicable" as meaning "capable of being carried into action, feasible." In *Potter v. Neave* ([1944] S.A.S.R. 19), Mayo, J., said: "whether 'everything reasonably practicable has been essayed, must be tested by the circumstances of the intending appellant and his accessibility to means for completing and lodging the initial documents. 'Practicable' may possibly be paraphrased in 'the context . . . as capable of being done or accomplished 'with the available resources whatever they may be.' I apprehend, it is unnecessary to show that compliance with 'the procedure laid down was quite impossible, but, be that so or not, it must at least be demonstrated as unreasonable to 'expect in the particular circumstances that exact compliance 'should be insisted on' (*ibid.*, 21). If the basic principle of this dictum be applied to the circumstances of this case and similar cases, I think that the test as to whether or not the stopping or parking was as close as practicable to the near edge of the roadway, depends on whether or not it was reasonable for the motorist concerned to park outside parked bicycles or whether the distance to which such parked bicycles forced him from the kerb, would make his parking there so unreasonable as to say that it was not practicable for him to park any closer. Each case must be decided on its own circumstances. It may be that now the position has arisen the transport authorities may think it proper to provide for road marking and a regulation prohibiting parking under such circumstances.

Having regard to the evidence of this case and particularly the conflict of evidence as to the position of the cycle stand, I am not prepared to hold that there has been a breach of the regulation and the information will be dismissed.

Solicitors for the defendant: *de la Mare, McLeod, and Murray* (Hamilton).

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## ANDERSON v. HARE.

1954. June 24; July 1, before Mr. J. R. DRUMMOND, S.M., at Wellington.

*By-law—Street Procession—Regulation of Procession in Named City Streets without Permit—By-law not a Prohibition—By-law not Ultra Vires or Unreasonable—Municipal Corporations Act, 1933, s. 354 (19).*

Clause 16A (2) of the Wellington City Consolidated By-law amendment No. 40, provides as follows :

16A (2) " Any person shall be deemed to commit a breach of this by-law who

" 1. Takes part in any procession in, along or upon any of the following streets, namely, Lambton Quay, Featherston Street, Customhouse Quay, Hunter Street, Willis Street, Manners Street, Cuba Street, Courtenay Place : otherwise than

" (2) Pursuant to the authority of and in conformity with the terms and conditions of a permit issued in writing under the hand of the Town Clerk and such permit shall specify [route, time, place, and directions to prevent obstructions] . . . "

Sub-clause 1 defines " procession " for the purpose of cl. 16A as " a group of persons with or without vehicles or animals which parades through any street in the city ; but does not include a group consisting only of persons conveyed in one vehicle or in a series of public conveyance engaged in normal transport service."

The defendant was charged that, on April 9, 1954, he took part in a procession without authority of the Town Clerk in contravention of cl. 16A of the by-law. (He was one of four persons separately charged with the offence and the prosecution against him was separately heard and taken as a test case).

On Friday, April 9, 1954, at 12.30 p.m., a traffic inspector of the Wellington City Council was on point duty at the intersection of Cuba and Manners Streets, Wellington, when he noticed a man who was carrying a pole with placard attached appear from behind a stationary tramcar in Manners Street. He was followed by others in a rather ragged line, meant to be a single file. All were walking on the roadway, and some of the line were carrying placards. The traffic at the time was fairly heavy. The inspector asked the first man if he had a permit to hold a procession. He replied that no permit was needed because it was not a procession. The inspector detained all who were taking part in the march, and one of these men was the defendant. According to the inspector's evidence, there were at least a dozen men in the group, some of whom were carrying placards relating to the 'H'-bomb. When he stopped them they bunched up ; but previously they had been some ten to fifteen feet apart. The City Traffic Superintendent gave evidence that no request was made to him by the defendant for any permit

for a procession on April 9, 1954, and that no permit was issued for any procession on that day.

*Held*, 1. That s. 364 (19) of the Municipal Corporations Act, 1933, gives adequate power to deal with processions so long as it is properly exercised; and that the by-law was not a prohibition of processions, and it qualified as a regulation of them.

*Hazeldon v. Mc Ara* (1948) 6 N.Z.L.G.R. 416) applied.

*Martin v. Smith* ([1933] N.Z.L.R. 636), and *Melbourne Corporation v. Barry* (1922) 31 C.L.R. 174 distinguished.

2. That the by-law was not unreasonable, as it was competent for the City Council to regard the subject-matter of the by-law as a restriction of certain activities in the interests of the public generally.

3. That the by-law was sufficiently certain in its terms to be capable of precise application.

4. That, on the facts, the defendant and those associated with him were taking part in a procession; and, having no permit, were acting in breach of the by-law.

INFORMATION under Clause 16A of the Wellington City Consolidated By-law amendment No. 40, which provided, in part, as follows:

"16A (2) Any person shall be deemed to commit a breach of this by-law who

"1. Takes part in any procession in, along or upon any of the following streets, namely, Lambton Quay, Featherston Street, Customhouse Quay, Hunter Street, Willis Street, Manners Street, Cuba Street, Courtenay Place; otherwise than—

"(a) Pursuant to the authority of and in conformity with the terms and conditions of a permit issued in writing under the hand of the Town Clerk and such permit shall specify [route, time, place, and directions to prevent obstructions]; or (b), (c), (d) and (e) as members of Police Force, Military or similar authority, "funeral procession or party of school children under direction of a teacher."

Sub-clause 1 defines "procession" for the purposes of the clause, as

"a group of persons with or without vehicles or animals which parades through any street in the city; but does not include a group consisting only of persons conveyed in one vehicle or in a series of public conveyances engaged in normal transport service."

The defendant Hare was charged that on April 9, 1954, he took part in a procession without authority of the Town Clerk and in contravention of cl. 16A of the above by-law. The defendant Hare was one of four persons separately charged with the offence so described, and by arrangement the prosecution against him was separately heard and taken as a test case.

The facts were that on Friday, April 9, 1954, at 12.50 p.m., a traffic inspector of the Wellington City Council was on point duty at the intersection of Cuba and Manners Streets, Wellington, when he noticed a man

who was carrying a pole with placard attached appear from behind a stationary tramcar in Manners Street. He proceeded towards the inspector followed by others in a rather ragged line. All were walking on the roadway and some were carrying placards. The inspector accosted the first man and asked him if he had a permit to hold a procession. The reply was that no permit was needed, because it was not a procession. The inspector detained all who were taking part in the march and one of these men was the defendant Hare. The inspector tried to get the men to walk on the footpath, but was unsuccessful. According to his evidence there were at least a dozen men in the group, some of whom were carrying placards relating to the 'H'-bomb. The traffic at the time was typical for Friday lunch-hour and was fairly heavy. In cross-examination, the inspector said that the line of men constituted rather a ragged file—meant to be single file. When he stopped them they bunched up, but previously they had been ten to fifteen feet apart. The Traffic Superintendent of the City Council gave evidence that no request was made to him by defendant for any permit for a procession on April 9, 1954, and that no permit was, in fact, issued for any procession on that day.

*MacGoun*, for the informant.

*N. R. Taylor*, for the defendant.

*Cur. adv. vult.*

DRUMMOND, S.M. [After finding the facts, as above]: There was no major contest as to the facts. Counsel for the defence in opening pointed out that cl. 16A, under which the prosecution is brought, replaces a previous by-law (No. 61 of the Consolidated By-laws, 1933), which was directed towards the control of processions, but which in form was much briefer than the present by-law. Counsel pointed out that in a decision of the Magistrate's Court in *Police v. Smith* ((1947) 6 N.Z.L.G.R. 276), the old By-law No. 61 had been held for various reasons to be invalid. The substantial differences between the old and the new by-laws were explained to be: (a) the new by-law contains a definition of 'procession'; (b) it purports to prohibit processions (without permit) in specified streets only; and (c) it creates certain exceptions which had not previously existed.

Counsel submitted, however, that notwithstanding the changed form of the by-law, it was nevertheless invalid because it was: (1) *Ultra vires*; (2) Repugnant to the general law of New Zealand; (3) Unreasonable; and (4) Uncertain.

Dealing with his arguments consecutively:—

1. He contended that the by-law was *ultra vires* because:—

(a) There is no provision in the Municipal Corporations Act, 1933, specifically giving power to deal with processions.

(b) If any such power exists it must be conferred by implication under s. 364 (19) of the Act.

(c) The Council cannot rely upon s. 364 (1) relating to the good rule and government of the borough.

(d) Nor can assistance be drawn from s. 175 because subs. 1 thereof relates merely to temporary stoppage of a street for purposes of repair or other temporary purposes, and

(e) Whenever a municipal corporation is intended to have a power of prohibition, this should be granted specifically and s. 364 (19) does not give a power of prohibition.

2. The second contention for the defence was that the by-law is repugnant to the general law of New Zealand. In support it was said:—

(a) At common law, a subject has a free right to use the street for the purpose of passing and repassing. Various authorities were quoted, including the decision of the Full Court of New Zealand in *Martin v. Smith* ([1933] N.Z.L.R. 636).

(b) A procession is to be regarded as the lawful use in the aggregate of individual rights of passing and repassing. For this proposition he cited *Melbourne Corporation v. Barry* (1922) 31 C.L.R. 174, a decision of the High Court of Australia. Considerable reliance was placed upon this decision, and I shall deal with it later. Counsel's deduction from this decision was that interference with the use of the highway by a procession is unjustifiable unless expressly authorized by statute. He contended that the only statutory authority in New Zealand which can possibly be invoked would be s. 364, subs. 19 of the Municipal Corporations Act, 1933, and that by the authority of *Martin v. Smith* ([1933] N.Z.L.R. 636), subs. 19, could not authorize the restriction imposed in the present case.

(c) If the by-law was not repugnant *per se*, it was *ultra vires* because a power to make by-laws "concerning" streets does not permit prohibition of the use of certain streets. For this proposition he relied upon the decision in *Hazeldon v. Mc Ara* (1948) 6 N.Z.L.G.R. 416—a decision on s. 364 (18) of the Municipal Corporations Act, 1933, and, in particular, on the use of the word "regulating"—regulating the use of public reserves. He says that the effect of that decision was that a power to regulate does not give power to prohibit, and that in *Hazeldon's* case the particular by-law was upheld only because the holding of a public meeting (which was there restrained) was only one of the possible uses of the reserve; and, therefore, the by-law was not a total prohibition. Referring to *Hazeldon's* case, he contended that the word "concerning" used in subs. 19 conferred less than a power of "regulating" and he referred also to the case of *Hanna v. Auckland City Corporation* (1945) 5 N.Z.L.G.R. 302 decided on the words "concerning buildings" where used in s. 364 (20). In his contention, the present by-law amounts to a total prohibition of procession and, as such, on the authority of *Hazeldon's* case, is valid.

3. His final submissions on the law that the by-law was invalid because it was unreasonable and uncertain; and he relied for these submissions again on *Hazeldon's* case and on *Police v. Smith* (1947) 6 N.Z.L.G.R. 276). His principal argument in this connection was that the granting of a discretion to the Town Clerk did not make the by-law any the less an unreasonable prohibition.

On the head of uncertainty, he took the definition of procession given in the by-law as "a group of persons which parades." He contended that, because "parade" had no legal meaning, the by-law must fail.

Having carried the argument to this stage on the validity of the by-law, counsel then addressed himself to the proved facts and said that the persons charged did not constitute a group because (as he said) they were not closely associated, and because evidence of a straggling line of men, some of whom carried banners, did not establish any kind of parade.

Dealing first with the legal propositions submitted, I shall take together the questions of *ultra vires* and repugnancy because the answer to these depends substantially upon whether the present by-law amounts to a prohibition of processions as the word "prohibition" is used by the

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authorities. The preliminary point that the Municipal Corporations Act, 1933, confers no specific power to deal with processions, I do not consider to invalidate the by-law; because I am satisfied that s. 364 (19) gives adequate power to deal with processions so long as it is properly exercised. For this reason it is not necessary to invoke s. 364 (1) or s. 175 of the Act.

In my view, the present by-law is not a prohibition of processions because it does not apply to all streets of the city, it does not restrain all types of procession, and it may be relaxed upon the authority of an officer of the City Corporation. It therefore meets the objections raised in *Police v. Smith* (1947) 6 N.Z.L.G.R. 276, and it qualifies as a regulation (as opposed to a prohibition) under the authority of *Hazeldon v. Mc Ara* (1948) 6 N.Z.L.G.R. 416.

The decision in *Melbourne Corporation v. Barry* (1922) 31 C.L.R. 174 was pressed very hard upon me. In that case, the Corporation had statutory power of "regulating traffic and processions." The by-law which was challenged prohibited processions through any street of the city save for military or funeral processions or with the previous consent of the Council. Two Judges of the High Court held that the by-law was invalid; the third learned Judge dissented. This case was considered in New Zealand in the judgment of the Full Court in *Hazeldon v. Mc Ara* (1948) 6 N.Z.L.G.R. 416, 428 where *Sir Humphrey O'Leary, C.J.*, made the distinction between the two classes of case (a) as in *Melbourne Corporation v. Barry* (1922) 31 C.L.R. 174, where a power of regulation is exceeded by prescribing that the subject-matter should not be allowed to come into existence unless the Council or an officer grants approval; and (b) where, as in *Kerridge v. Girling-Butcher* [1933] N.Z.L.R. 646, "a certain power of prohibition is implied in the power to regulate and control."

In the present case there are several points of difference from *Barry's* case. First, the restriction applies only to named streets. It is to be noted that *Isaacs, J.*, in *Barry's* case (1922) 31 C.L.R. 174; 197 made objection to the by-law because it affected "every street, large or "small, populous or not." He pointed out that the statutory purpose was the regulation of processions, though this might prohibit some, and he said he could see no difficulty in the Council stating routes which it thought were suitable or unsuitable for a procession. That, in effect, is what the Corporation has done in the present case. A second distinction is that the Corporation in *Barry's* case did not have the assistance of s. 13 of the By-laws Act, 1910, expressly authorizing the leaving of certain determinations to an officer of the local authority.

Finally, I think that the words "concerning streets and the use of thereof" in s. 364 (19) may well confer wider powers than those of merely "regulating" a named activity. If it were necessary for me so to hold, I would incline to the view that s. 364 (19) gave power to prohibit processions. As counsel for the prosecution pointed out, the use of the word "prohibit" would have been inconvenient in subs. 19, which referred generally to activities of varying kinds in relation to streets—for some of which prohibition might be suitable and for some of which it would be obviously unsuitable. For these reasons, I am of the opinion that the present case is within the second clause mentioned by *Sir Humphrey O'Leary, C.J.*, in *Hazeldon's* case (1948) 6 N.Z.L.G.R. 416, i.e., "where a certain power of prohibition is implied" (*ibid*, 428).

As regards the case of *Martin v. Smith* [1933] N.Z.L.R. 636 (also cited to support the proposition of repugnancy), this was a by-law re-

stricting the use of any street or footpath and was held to be repugnant as an undue interference with the paramount rights of the general public. That case, therefore, is distinguishable because of its application to the whole of the city without exception. For the foregoing reasons, I hold that the present by-law is neither *ultra vires* the City Council nor repugnant to the common law of New Zealand.

On the question of reasonableness, I must approach the matter from the benevolent point of view stipulated in *Kruse v. Johnson* ([1898] 2 Q.B. 91) and similar cases. Where a public body is charged with controlling the use of highways in the interests of the whole number of its constituents, it is entitled to have the utmost weight given to its decision. Here, the use of certain streets in the city for the purpose of processions, not being processions of a kind normally encountered and officially controlled (military, funeral, or school children) is prohibited, save under permit, in the interests of the free passage through those streets of individual citizens proceeding separately. This, in my view, is not what was described in *McCarthy v. Madden* ([1914] 33 N.Z.L.R. 1251, 1269) and cited in *Martin v. Smith* ([1933] N.Z.L.R. 636, 642) as a by-law "which destroys or unnecessarily abridges or interferes with a public right without producing a corresponding benefit to the inhabitants of the locality." In my opinion, it was competent for the City Council to regard this as a restriction of certain activities in the interests of the public generally. If the appropriate authority cannot do this, city traffic might well become unmanageable. *Hazeldon's* case again is authority for regarding the discretion left to the Town Clerk as a factor in determining reasonableness. On these grounds, therefore, I hold that the by-law does not fail for unreasonableness.

That leaves the question of uncertainty arising out of the language of the by-law. *Isaacs, J.*, in *Barry's case*, ([1922] 31 C.L.R. 174) suggested a *prima facie* definition of a procession as "a moving assemblage of individuals for a common purpose" (*ibid.*, 183). This by-law provides its own definition in language slightly different from that quoted, but in my view of a similar effect—"a group of persons . . . which parades through any street in the city."

I find little difficulty in attaching a meaning to that expression and am satisfied that the by-law is sufficiently certain in its terms to be capable of precise application. A group is defined (*Funk and Wagnall's Dictionary*) as "a number of persons or things existing or brought together with or without inter-relation, orderly form or arrangement." The nature or purpose of the grouping is supplied in the by-law by the word "parade," which is defined in the same dictionary as "turns out and forms or manoeuvres for display; promenades for show." A group or number of persons turning out, forming or manoeuvring for display is, therefore, the essence of the definition. I find that this permits of the by-law's being applied to any given facts with certainty. Counsel's difficulty is perhaps occasioned by the fact that what is charged with being a procession on this occasion was perhaps the most emaciated specimen of its kind which could well be imagined.

As in my views, the by-law cannot be ruled invalid for any of the reasons put forward by the defence, the only question remaining is whether the defendants now before the Court were, in fact, taking part in a procession as therein defined. The proved facts indicate that the defendants were manoeuvring (in a ragged line of single file) in a city street and some of them were displaying banners. They were undoubtedly parading; the only question is whether they constituted a

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group. In my opinion, they did form a group. As regards city traffic generally, they were together; they were in the roadway and thereby distinguished from the common flow of pedestrians on the footpath; they were associated by the bearing of banners of common character and the mere fact that some fifteen to twenty feet at times separated the individual members, does not, in my view, make them cease to be a group when one considers the other circumstances of association. There was some degree of formation and a definite display. They had the obvious purpose of attracting attention; and that is one of the principal evils (from a control point of view) associated with a procession, on account of its tendency to cause other people to accumulate and watch them.

In these circumstances, I find as a fact that the defendant and those associated with him were taking part in a procession and having no permit were acting in breach of the by-law. The defendant must, therefore, be convicted. As there is no indication as to whether he represents the other defendants financially, they will all be treated alike in the matter of penalty. No great obstruction is proved to have occurred and the matter has been treated somewhat as a test case. A heavy penalty is, therefore, not called for. The defendant in this case (and each other convicted by the same determination), will be fined £2 and required to pay costs.

*Defendant convicted.*

Solicitor for the informant: *City Solicitor* (Wellington).

Solicitors for the defendant: *Duncan, Mattheus, and Taylor* (Wellington).

## **AUCKLAND TRANSPORT BOARD v. MONCUR.**

1954. August 19, 26, before Mr. M. C. ASTLEY, S.M., at Auckland.

*Transport—Concession Ticket—Such Ticket a Contract to provide Twelve Rides on Board's Transport on Payment of Specified Amount—Board purporting to Cancel such Ticket on Raising of Fares—Power to revoke Existing Scale of Charges not operating to revoke Existing Concession Ticket for which Charge paid—Fare Order ultra vires in Purporting to cancel Such Ticket—Transport Act, 1949, s. 125 (8) —Transport Amendment Act, 1950, s. 6.*

Before January 30, 1954, the defendant paid 3s. for a ticket from the Auckland Transport Board. Known as a "concession ticket", it evidenced that for 3s. the holder was entitled to twelve separate one-section rides on the Board's transport. It fixed no time-limit for performance; it had a short statement of conditions printed on it; and it was "issued subject to the Board's "By-laws, Regulations and Fare Orders."

On March 2, 1954, the defendant boarded one of the Board's trams intending to travel inside one section, and tendered to the conductor the 3s. concession ticket. The conductor informed him that it was out of date, explained a change which had been made in fare rates, and asked for payment of a fare. The defendant, claimed

that he had given value for his ride, and refused to pay any other fare. The reason for the conductor's refusal to accept the ticket, was that, on January 30, 1954, the Board had purported to cancel that kind of ticket, and to replace it with one costing 3s. 3d. On being asked to call at the Board's office, the defendant wrote to the Board enclosing 3½d. in stamps (being ½d. in excess of the calculated rate for twelve rides for 3s. 3d.).

On an information charging him with attempting "to use a ticket when such a ticket was not available contrary to the provisions of By-law No. 1, s. 6, subs. 6 of the Auckland Transport Board",

*Held*, 1. That, as the concession ticket represented a contract at common law between the Transport Board and the purchaser, whereunder for a cash payment, the purchaser was entitled to twelve defined rides on the Board's transport vehicles; and that the power conferred on the Board by s. 125 (8) of the Transport Act, 1949 (as enacted by s. 6 of the Transport Amendment Act, 1950,) to revoke an existing charge "in such manner as it thinks fit" did not operate to revoke the contract represented by the concession ticket.

*Greig v. Collins* ((1949) 7 N.Z.L.G.R. 198) followed.

2. That the Board's Fare Order, purporting to cancel the concession tickets already sold, was, to that extent, *ultra vires* the Transport Act, 1949; and the ticket remained a valid one.

INFORMATION charging the defendant with using a ticket of the Auckland Transport Board where such ticket was not available contrary to the provisions of By-law No. 1 s. 6, subs. 6 of that Board.

The facts sufficiently appear from the judgment.

*B. C. Haggitt*, for the informant.

Defendant, in person.

*Cur. ad. vult.*

ASTLEY, S.M. The defendant at some time before January 30, 1954, purchased for 3s. a ticket from the Auckland Transport Board. It was what is known as a concession ticket evidencing that, for the sum of 3s., the holder was entitled to twelve separate one-section rides on the Board's transport. It fixed no time limit for performance, and had a short statement of conditions printed on it, the only one relevant to this inquiry being "this ticket is issued subject to the Board's By-laws, Regulations, and Fare Orders."

On March 2, 1954, the defendant boarded one of the Board's trams intending to travel inside one section, and tendered to the conductor a 3s. concession ticket. The conductor informed him that it was out of date, explained a change which had been made in fare rates, and asked for payment of a fare. The defendant, who, I am satisfied, had no knowledge himself of the change in the scale, being an infrequent traveller on the trams, claimed that he had given value for his ride and refused to pay any other fare. He willingly gave his name and address to the conductor.

The reason for the conductor's refusal to accept the ticket was,



that on January 30, 1954, the Board had purported to cancel that kind of ticket and to replace it with one costing 3s. 3d.

For reasons which I will give later, I here mention the correspondence which then passed between the Board and the defendant. On March 4, the Board wrote to the defendant stating that it had a report that he had "attempted to use an out of date one-section concession card in payment of your fare thereby committing a breach of the Board's By-law". The defendant was requested to call at the Board's office within fourteen days and see the Board's inquiry officer.

The defendant replied with some heat and a little sarcasm, covering the facts fully, and also enclosing 3½d. in stamps, being ¼d. in excess of the calculated rate per ride at 3s. 3d. for twelve.

On March 10, the Board's Manager replied, acknowledging receipt of the 3½d. in stamps, and went on :

"I would point out that the receipt of this money does not absolve you from the breaches of the By-law which you have already committed, namely—

"(1) *A.T.B. By-law No. 1 Section 6, Clause (3)—*

"No person travelling by a car shall by any means evade or attempt to evade payment of the proper fare for the journey.

"(2) *Clause (6)—*

"No passenger shall use or attempt to use a ticket when such ticket is not available.

"Should you fail to call at this Office within the time previously stated, I shall be reluctantly compelled to take further action."

I remark that no reason is given in this letter as to why the defendant was to call at the Board's office.

The defendant replied to this letter with considerably more, though dignifiedly expressed, heat, than his first letter. He did not call at the Board's office.

He was then prosecuted on the present charge,—namely that he "did attempt to use a ticket when such ticket was not available" contrary to the provisions of By-law No. 1 Sec. 6, Subs. 6 of the "Auckland Transport Board."

The defendant appeared but was not represented by counsel. In those circumstances, Mr. Haggitt for the Board properly made available all the relevant facts and also referred me to the case of *Greig v. Collins* ((1949) 7 N.Z.L.G.R. 198) where a similar issue was decided by Willis, S.M., adversely to the Dunedin City Corporation. In that case the Price Tribunal under the Control of Prices Act, 1947, had authorized an increase in fares, including the rates to be charged for concession tickets. The defendants in that case were charged with the same offence as here, in the same circumstances except that there the defendants had apparently deliberately used the tickets after having notice of the change in rates, and there were no printed conditions on the ticket.

In this case the Board purported to act in connection with its alteration in fare rates under the authority of the Transport Act, 1949, and the first point is to resolve its powers in that behalf.

The general power is contained in s. 123 of the Transport Act, 1949 (as enacted by s. 4 of the Transport Amendment Act, 1950) the relevant words being :

"The public body (which designation includes the Auckland Transport Board) owning any transport service may at any time of its own motion . . . proceed to fix, review, or alter the charges which may be made in respect of that service."

In s. 125 (8) of the Transport Act, 1949 (as enacted by s. 6 of the Transport Amendment Act, 1950) the relevant words are :

"(8) Where a public body . . . has decided of its . . .  
 "own motion to fix, review, or alter any charges . . . the public  
 "body . . . shall make an order fixing the charges or altering  
 "or confirming or revoking any existing charges, in such manner  
 "as it . . . thinks fit."

Section 126 (2) of the Transport Act, 1949 (as enacted by s. 7 of the Transport Amendment Act, 1950) provides that :

"(2) Where an order is made under section one hundred and  
 "twenty-three or section one hundred and twenty-five of this Act  
 "fixing any charges or confirming or altering or revoking any charges,  
 " . . . the public body . . . shall . . . forthwith give  
 "public notice thereof, specifying in such notice . . . (b) partic-  
 "ulars of the charges as fixed or altered or confirmed or revoked by  
 "the order . . ."

In pursuance of its powers under s. 123 and 125, the Board made a fare order on December 9, 1953, the relevant parts of which read as follows :

"A. That in terms of the Transport Act, 1949, and its Amend-  
 "ments the existing Schedule of Road Transport Charges of the  
 "Auckland Transport Board be hereby amended by replacing the  
 "undermentioned existing scales with the new scales set out below.  
 "Conditions of use and availability of tickets shall remain unchanged  
 "other than where provided hereunder :

"(2) Concession Cards (Adults)—

*Existing Scale*

*New Scale*

"1 section . . . 3s. 3s. 3d.

"B. That when the new fares listed in Clause (2) above become  
 "effective present ordinary concession tickets . . . will be  
 "deemed to be cancelled and the Board shall refund the value of  
 "unused rides at proportionate rates on presentation of the tickets  
 "to the Board's office within one month from the effective date of  
 "the price alteration."

In pursuance of its duties under ss. 126 (2) the Board gave public notice on January 22, 1954, under the Transport Act, 1949, as follows :

*"New Scale of Fares"*

"Public Notice is hereby given that commencing Saturday,  
 "30th January, 1954 the scale of fares will be as follows : . . .

"Adult Concessions (a) 12 trip 1-section 3s. 3d.

"(6) Old Price Concession Tickets will not be sold after 26th  
 "January. They will be accepted on vehicles until Friday, 5th  
 "February, 1954 . . . Refunds for unused rides can be obtained  
 "from the Board's Head Office up to 1st March, 1954."

Public notices were also posted in transport vehicles stating :

"Passengers are notified that a new Fares Schedule will operate  
 "commencing Saturday, 30th January, 1954,"  
 and also drawing attention to advertisements to appear in local news-  
 papers.

The first point to be considered is the nature of this concession ticket. It represents beyond doubt, and was so found by *Willis, S.M.*, in the Dunedin case already mentioned, an ordinary contract under the common law made between the Board and the purchaser thereof, whereunder for the price of 3s. paid in cash, the purchaser is thereafter entitled to twelve defined rides on the Board's transport.

The case for the prosecution clearly requires it to be shown, as a first step, that the Board had statutory powers to revoke or repudiate that contract, by unilateral action. It has to rely upon the words contained in the sections of the Act quoted above, the relevant words being in s. 125 (8) :

“or revoking any existing charges in such manner as it thinks fit.”

It is not necessary for me to quote legal authorities, which have always, and over many years, found that statutes which detract from rights of ownership, or which interfere with contracts of this kind, are to be construed strictly, and that such an intention on the part of the Legislature is not to be imputed unless expressed in clear and unambiguous language.

Upon that principle, I cannot find that the power to “revoke an existing charge in such manner as it thinks fit” means the power to revoke this contract. A charge is a price, a consideration, a cost, or a rate of payment. It is only one element in the contract made by the Board with its customer. In this case it had been paid and finished with. It was a whole charge for twelve rides and was not divisible into single charges for single rides. Having been paid, there was left the obligation of the Board to perform its part of the contract, namely—to carry the holder on the twelve rides in its transport. In result, therefore, there was at the time of the Fare Order, and of this alleged offence, no “existing charge” at all, but there was an obligation to render a service under an “existing contract” in respect of which the charge had already been paid.

I do not regard the words in the statute even as ambiguous. If there existed any ambiguity then, by law, such ambiguity would be resolved against the Board and in favour of the defendant.

If the Board has no power to cancel or revoke this contract, then, it is hardly necessary to add, it has no power to make a fare order expressing such an intention; and, to the extent to which it has purported so to do, it has acted *ultra vires* the statute, and the defendant's implied acceptance of the terms of the Board's fare orders (as printed on the ticket) cannot bind him to something which the Board had no power to do.

In addition to that finding, I am doubtful whether the Board, so far as its purported intention to cancel this ticket is concerned, carried out the provisions of s. 126 (2) in its public notice, which, it can be seen from its perusal, contains no direct reference to the intended cancellation of the existing tickets as set out in the fare order. It says that old price concession tickets will not be sold after a certain date, that they will be accepted for a few days thereafter and that refunds for unused rides can be obtained. The issue here turns on the proper implications to be drawn from the words “will be accepted until the 5th February, 1954,” in the context of the whole notice. What the Board said in its Fare Order and what it should have publicly notified was that “tickets will be accepted until, *but not after*, the 5th February, 1954.” The phraseology which was used cannot, in my opinion, be construed positively and without doubt as notifying the public of any revocation or cancellation of existing concession tickets.

As with the broad principle of statute interpretation already quoted, it is also a well-established principle that when statutory powers are given, and the method of carrying out those powers is prescribed by the statute, failure to comply with the prescribed method is a failure to exercise the power.

I have raised and partly examined this point because the defendant was not represented by counsel; and, I think, counsel would have raised it. I refrain from deciding the issue, and say that, on this point, in my opinion, the onus is still with the prosecution to satisfy the Court that the public notice given was adequate.

For the reasons given, I find that the offering of the concession ticket in issue in this case was not an attempt by the defendant to use a ticket contrary to the By-law quoted in the information, and the charge is dismissed. The ticket is still valid.

I refer now to the correspondence which passed between the Board and the defendant, and particularly to the Board's letter to the defendant of March 10 last. It will be seen that, having received the defendant's 3½d. in stamps, and having stated that he has, nevertheless, committed two breaches of the Board's By-law, it then goes on to state that should he fail to call at the Board's office within the time previously stated (fourteen days from March 4) (there follow the words) "I shall be reluctantly compelled to take further action". No specified reason was given for requiring the defendant's attendance; and, indeed, it is difficult to perceive any good reason at all for this demand, because a full statement of the facts had already been received by the Board from the conductor, and from the defendant himself. Does the letter mean that if he did attend, action would not be taken? It is to be noted that that action is a criminal proceeding, and it is quite improper to bargain on such a basis. If that was not the meaning, then there remains simply a threat of criminal proceedings intended to summon a citizen into the presence of the Board's officers. That is plainly coercive; and the making of such demands and the use of quasi-legal words in the expression of such, when, in fact, the Board has no power whatever to summon people in such a manner, is to be strongly deprecated.

The defendant, in his letters, complained of these matters and I have no hesitation in saying that his complaint was justified.

The defendant will have an order for costs for his attendances in Court against the Board of £1 4s.

*Information dismissed.*

Solicitors for the informant: *Earl, Kent, Massey, Palmer, and Haggitt* (Auckland).

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## NELSON v. HAWKE'S BAY CATCHMENT BOARD.

1954. March 31, April 1, 2, June 17. Hawke's Bay Land Valuation Committee, Mr. W. A. HARLOW, S.M., Chairman.

*Public Works—Soil Conservation and Rivers Control—Land taken for Flood-protection—Stand of Poplar Trees on Land used for making and marketing Fencing-Battens—Claim for Loss of Trees—Potentiality Principle not extended to Produce of Land—Compensation payable on Basis of Capitalization of Receipts in Nature of Royalties—Soil Conservation and Rivers Control Act, 1941, s. 145—Finance Act (No. 3), 1944, s. 29 (1).*

Certain land was taken by the respondent Board for flood-protection purposes under the Soil Conservation and Rivers Control Act, 1941. On this land there was a stand of 900 poplar tree, which had matured into a fine stand of poplar timber grown under forestry conditions. This timber was split into battens, of which the owner had sold about 31,000 battens, and 2,220 stakes, all within two years.

On a claim for £14,961 representing compensation for the land taken by the respondent Board, the greater part of the amount was claimed in respect of the loss of the timber represented by the poplar trees,

*Held*, 1. That compensation for the loss of the claimant's timber was to be assessed on the basis of the amount the claimant could expect to receive by way of royalty from a person engaged in the business of reducing standing timber to merchandise, as the production of fencing-battens was not a potentiality of the land taken, but a use to which the produce of the land could at once be put.

*Marshall v. Minister of Works* ([1950] N.Z.L.R. 339; [1950] G.L.R. 20) distinguished.

2. That, accordingly, the claimant was not entitled to have his loss of the timber stand computed by reference to the profit he might have made on the realization of it by himself had he remained in possession of the land and had continued in the business of a successful producer of fencing-battens.

3. That by virtue of s. 29 (1) (b) of the Finance Act (No. 3), 1944, a claimant is to be regarded as a willing seller at the specified date; but an owner who virtually insists that, in addition to immediate payment for the value of his land, he shall have the right to remain in possession for a number of years in order to dispose of the fruit of that land to its best advantage does not qualify as a willing seller; and any allowance made to expedite delivery of possession before he has achieved his purpose would probably be classed as "made on account of the taking of any land being compulsory," an allowance which is directly prohibited by s. 29 (1) (a) of the Finance Act (No. 3), 1944.

4. That the claim had to be determined on the basis of the capitalization of receipts on the nature of royalties which could have been obtained for the timber at the specified date.

CLAIM for £14,961 representing compensation for land taken by the respondent Board for the purpose of flood-protection; the Board offered £900, thus leaving £14,061 in issue.

The facts sufficiently appear from the judgment.

*Scannell*, for the claimant.

*Woodhouse*, for the respondent.

*Cur. adv. vult.*

The judgment of the Committee was delivered by

HARLOW, S.M., (Chairman). Section 145 of the Soils Conservation and Rivers Control Act, 1941, provides that the owner of land so taken shall receive full compensation therefor on a claim presented in the manner prescribed by the Public Works Act, 1928, save that in the assessment there is to be no reduction for betterment, presumably because the claimant will pay for that in the form of rates. Quantum, therefore, falls to be determined under the provisions of s. 29 (1) of the Finance Act (No. 3), 1944, but disregarding para. (e) thereof. For present purposes, it will suffice to quote para. (a) and an extract from para. (b):

"(a) No allowance shall be made on account of the taking of any land being compulsory.

"(b) The value of the land shall . . . be taken to be the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realize . . ."

The specified date, by the way, has, by virtue of the operation of s. 8 of the Public Works Amendment Act, 1952, been fixed as July 7, 1952, but the claimant readily conceded that he remained in substantial occupation of the land for a little over six months after that date.

The land concerned is a freehold of 13 ac. 12 pp.; it is situated near the Tuki-tuki River at Mangateretere, on the eastern edge of the Heretaunga Plain, and the whole of it lies on the river side of an earlier stop-bank constructed many years ago by the now defunct Hawke's Bay Rivers Board. On the area taken is a stand of 900 poplar trees planted in the early years of the century by a predecessor in title of the claimant—his grandfather, in fact—following upon a flood in 1897, with the object of holding the then newly-deposited silt and preventing erosion. It can be said now that these plantings have matured into an exceptionally fine stand of poplar timber grown under forestry conditions, the like of which is not to be seen elsewhere in New Zealand. The greater part of the claim, by far, is in respect of the loss of the timber represented by these trees.

The land in question consists of two separate parcels; the first and much the larger contains the trees and is 12 ac. 32 pp. in extent; the other which is physically separated from it and the remainder of the claimant's land and is situated some little distance from the first piece, has an area of 3 rs. 20 pp. The poplars are of three varieties, but for practical purposes can be classified as lombardy and broad-crowned; at the specified date there were 778 of the former and 122 of the latter growing upon the land taken; this left the claimant with roughly 300

trees of the same stand on a relatively small portion of his 190-odd acre farm.

The claimant is primarily engaged in farming and generally uses his land accordingly, principally for sheep, but he also produces grass-seed and runs a few steers; he is generally regarded as a successful farmer. A month or two before the specified date, however, he branched out into a new enterprise, commenced to fell the trees and split the logs into fencing-battens and succeeded in marketing these battens in a small but indisputably profitable way in this part of Hawke's Bay.

The work of felling and splitting was conducted as a side line at times when the exigencies of normal farm work permitted. The claimant is also an experienced bushman, and in splitting the poplar timber into battens he employed a technique of his own. This appears to be more laborious than the customary "rough and ready" methods in use at a sawmill, but it seems to produce a more even line of battens and consequently lessens the proportion of the log normally cut to waste. With the aid of his permanent hand and a casual employee, claimant produced and sold about 31,000 battens and 2,200 stakes in slightly under two years. His gross return for this was about £1,000 and he estimates his profit at roughly £750. His claim for the loss of timber is based on this result.

The claim is formulated as follows:

13 acs. 12 pp. of land @ £80 per acre	.. ..	£1,046
608,330 battens from 778 lombardy poplars (by volume, 70,986 cu. ft.) @ £2 per 100	.. ..	£12,166
68,978 battens from 122 broad-crowned (by volume, 8,404 cu. ft.) @ 50s. per 100	.. ..	£1,724
Firewood and willow	.. ..	£25
		<hr/>
		£14,961

In round figures, this means £1,000 for land and £14,000 for timber.

The bald substance of a claim for this amount was formally presented on June 20, 1953. Shortly after that date, representatives of the Board met Mr. Nelson on the ground, and this resulted in some negotiating with a view to leaving the claimant in possession of his trees or, alternatively, to his removing a large part of them, more or less in his own time. Nothing came of these negotiations, but it is here proper to interpolate that, in the view of the Committee, nothing prejudicial to the claimant is to be inferred or deduced from this fact; after all, he has been deprived of his land and his trees and is entitled to be compensated therefor in money.

The claimant gave evidence himself and called a number of witnesses in support of his claim in its several parts; the Board replied with a comparable body of evidence directed to show that the claimant's value of the land taken was excessive and that his evaluation of the proceeds to be expected from realization of the stand of poplars was utterly out of proportion to the true worth thereof. By way of interpolation, it might here be mentioned that, in the experience of this Committee, marked divergences on this score have become so common as to be regarded as inevitable in cases of this kind. It is not proposed to traverse the evidence of the various witnesses in detail; to do so would be laborious, and, in any case of doubtful profit.

The claimant computes his loss in respect of the timber on the assumption that, by virtue of his experience over the past two years in the pro-

duction of fencing-battens; from a part of the stand in a small way of business, with nothing at all in the way of overhead expenses, he has established a percentage of profit per tree felled which, by a process of simple arithmetic, fixes the aggregate he could have expected to receive from the realization of the whole stand, during the next seven to ten years, in a large way of business and without any increase in overhead. The aggregate amount of profits thus computed reaches nearly £14,000 which, in his contention, represents the amount of compensation to which he is entitled in this behalf.

Before examining the merits of the claim, let us consider the legal basis upon which the contention for it is said to rest. Counsel argued that claimant is entitled to have his compensation assessed on the basis of the *profit* that might have been gained from his mode of realization of the timber. In the submission of counsel for the Board, however, the claimant must be satisfied with the amount he could expect to receive by way of *royalty* from a person engaged in the business of reducing standing timber to merchandise, such as a miller or another of that ilk.

Developing his argument, counsel for the claimant instances the possibility of neighbouring farmers possessed of comparable stands of timber from which each commences to produce battens *a la* Nelson; after five years, the land of one is taken for the purpose of a public work; the other goes on to draw profits from the continuation of his enterprise for a further five years. "Full compensation," he submits, seems to demand that the one deprived of his land should be paid as much for the timber on it as the other is permitted to take in profit on the realization of the remainder of his trees; assessment of the former's loss on a royalty basis will fall far short of this. Counsel then goes on to argue that the production of battens is a potentiality of this particular piece of land and that the claimant is entitled to have compensation assessed on a profit basis by virtue thereof. In support of this, he relies on certain *dicta* from the judgment of *Gresson, J.*, in *Marshall v. Minister of Works* ([1950] N.Z.L.R. 339; [1950] G.L.R. 20); in particular, the references to "profit he might thereby have been able to derive from the land" in the future" (*ibid.*, 350; 21) and "profit that would accrue to him" by making use of it had he retained it in his own possession" (*ibid.*, 350; 22).

The well-established principle brought to bear in *Marshall's* case ([1950] N.Z.L.R. 339) seems to lack direct application in the circumstances of this one. There, the learned Judge was concerned to consider the potentiality value of the land itself, that being the difference between the value of the land in present use as a farm and its value subdivided into building sections, provided that reasonably early subdivision could be shown to be sound business. The "profit" referred to is thus the net amount to which the owner would become immediately entitled on a notional change in the utilization of the land itself. Now, no change in the use to which Mr. Nelson's land should be put has been suggested; moreover, at the specified date the stand of timber, which represented the immediate fruit of that land, was an actuality. It seems, therefore, that the production of fencing-battens was not a potentiality of the land, but rather a use to which the produce of that land could at once be put.

In an effort to ascertain whether the potentiality principle has ever been extended beyond utilization of the land itself a number of authorities have been considered. The occasion does not warrant a recital of the many instances of the application of the principle, but it can at once be said that no case was found where it was held, or, in



the course of reasons for the decision, suggested that its aid could be brought to bear in circumstances comparable with the instant case. The authorities considered included the following : *R. v Brown* ( (1867) L.R. 2 Q.B. 630); *I.R.C. v. Clay* ([1914] 3 K.B. 466); *Raja Vyricherla v. Revenue Divisional Officer, Vizagapatam* ([1939] A.C. 302; [1939] 2 All E.R. 317); *St. John's College v. Auckland Education Board* ((1945) 5 N.Z.L.G.R. 294); *In re a Proposed Sale, Lehmann's Trustees to Beamish* ([1944] N.Z.L.R. 772); *In re a Sale, Stafford to Adair Brothers* ([1946] G.L.R. 372) and *Marshall v. Minister of Works* ([1950] N.Z.L.R. 339; [1950] G.L.R. 20).

In the judgment of the Committee, the claimant is not entitled to have his loss of the timber stand computed by reference to the *profit* he might have made on the realization of it by himself had he remained in possession of the land *and continued in the business* of a successful batten-producer.

And there are other reasons both in law and on the merits why his claim in this regard must fail. First, under the statute he is to be regarded as a willing seller at the specified date ; an owner who virtually insists that, in addition to immediate payment for the value of his land, he shall have the right to remain in possession for a number of years in order to dispose of the fruit of that land to its best advantage scarcely qualifies as a willing seller ; any allowance, therefore, made to expedite delivery of possession before he has achieved his purpose would probably be classed as made on account of the taking of the land being compulsory, an allowance which is directly prohibited by s. 29 (1) (a) of the Finance Act (No. 3), 1944.

Again, on the merits there are many serious flaws in the construction of this claim ; some of which may shortly be put as follows :—

(a) There would be no realization at all without the expenditure of time, effort, and money, in rendering the produce of the trees merchantable—incidentally, Mr. Nelson's allowance for this seems somewhat inadequate ;

(b) Secondly, no "profit" in the proper sense of that term would be earned until such time as the finished product had found a market big enough to absorb it, and, even then, not until sufficient battens had been sold *and paid for* to cover the outlay involved in the manufacture and marketing of the total production *plus an amount equivalent to the sum of the royalties* which the land-owner would have received from sale and disposal of the whole of the timber on a royalty basis ; then, and only then, can he commence to count the profits of realization ;

(c) The claimant has been in possession of this land since 1929 ; some of the trees must have been near enough to maturity before the war. Again, if only by reason of the fact that he was a member of the Board, he must have had cognizance of the proposal to take the land some time in advance of the event. These premises prompt the question—if the profit was there, why did he wait to take it until the opportunity to do so was about to be denied ? This, admittedly, is not to be regarded as of great significance, but it obviously calls for mention.

(d) The claimant's calculations concerning the number of battens that he might expect to produce from the stand makes inadequate allowance for a number of factors such as loss on conversion of logs into battens, and nothing at all for contingencies such as fire, flood, and the like. It may well be that the first miscalculation was the result of insufficient information from the forestry experts, but that cannot be advanced as a ground for the acceptance of figures which purport to show a realiza-



a wholesale scale and subsequently marketing the same at keenly competitive prices might not, in view of the relatively small sum to be expended in plant and equipment, have offered a little more to secure the produce of a clean compact stand in a handy situation—an ideal which they or it could not hope to achieve in the case of native timber. The Committee considers that such an enterprise could have afforded to pay and would have offered an advance of 10 per cent. in order to outbid less specialized competitors. In other words, Mr. Nelson could have bargained and sold for the equivalent of a royalty at the rate of 11s. per hundred super-feet which eventually would have resulted in the receipt by him of £1,650 in the aggregate. In the judgment of the Committee, the present value of that sum is the amount which the willing seller could fairly have expected to receive for the timber on this property at the specified date.

Should the question be raised that since an advance of 10 per cent. on the customary royalty is conceivable and properly allowable, then why not 20 per cent., or 50 per cent., or 100 per cent? Let it be understood that the evidence discloses healthy enough competition in this line of property to render any greater increases unreal. Moreover, it is well recognized that no man or group of men prepared to venture into the field of production, cope with the risks and endure the worries attendant thereon and then go on to face the hazards of the market and suffer the further worries associated therewith will do so without the prospect of pocketing the prize—*viz.*, the profit. Unless, therefore, that prospect is clearly visible, unclouded by the mists of suspicion as to its reality, each individual adventurer will seek engagement at a fixed wage with little worry and no risks. Put in another fashion, he will decline to embark on the venture at all, or, having embarked, will struggle to withdraw the moment he becomes conscious of the fact that he will have to share the prize with one who has not shared the risks and worries in the winning of it. Any further advance on a royalty already set slightly above average would immediately bring forth that consciousness and the consequences of it. And, in the Committee's understanding, it follows that the braking effect of this fundamental truth must be deemed to govern the amount of the notional royalty in the instant case, even if the part of "notional adventurer" be cast to a company formed by Mr. Nelson, or the latter himself.

Compared with the timber, the difference between the parties as to the value of the land itself was less marked, being of £1,046 against £430. The evidence on this aspect was not very convincing on either side. The land was, of course, subject to more or less regular flooding, but the claimant's stock losses over a period of twenty-four years were negligible. It will probably come as no surprise that the Committee reached the conclusion that the claimant's estimate of value was excessive while the Board's figures seemed to be unduly low.

As between the two parcels, the smaller must obviously be worth less per square pole than the larger; indeed, the claimant himself had not even been aware of his ownership and consequently had never exerted any of the rights thereof over it. The Committee assesses the value of the larger parcel at £670 or slightly under £55 per acre, and of the smaller at £30 making £700 in all for the land itself.

The aggregate of the timber royalties will, of course, have to be discounted to represent the present worth of the same, and some deduction will also have to be made for the six trees removed by the claimant, with permission, but after completion of the quantity survey. To some

extent, the discount may be offset by a credit in the nature of interest on the amount accrued due since date of possession.

After making allowance for these various factors one way and the other, the Committee finds the amount of compensation to which the claimant is presently entitled to be £2,200.

The question of costs is now open to argument.

*Compensation awarded accordingly.*

Solicitors for the claimant: *Scannell and Bramwell* (Hastings).

Solicitors for the respondent: *Lusk, Willis, Sproule, and Woodhouse* (Napier).

### BLAND v. PURDY.

1955. February 2, 4, before Mr. H. JENNER WILY, S.M., at Auckland.

*Transport—Taxi-cab Fares—Waiting-time—Stoppages on Journey—Taxi-driver's Election to Charge for Waiting-Times on Continuous Time-basis—Notice of Election not required.*

Schedule B of the Taxi Fare Schedule for Auckland City was divided into Parts A, B, C, and D, headed respectively, A. Hirings by Distance; B. Hirings by Time; C. Hirings for trips beyond the Auckland Transport District; and D. General. Each of these Parts is divided into numbered paragraphs. The relevant paragraphs in issue were as follows:

"A 4. Waiting time shall be charged at the rate of 6d. every 5 minutes provided that after 30 minutes of waiting the driver must inquire and ascertain that the hirer desires him to continue waiting."

"D 2. Where the waiting time during any journey exceeds 30 minutes, the taxi-cab driver may determine whether the charge shall be by distance or by time."

The informant engaged the defendant in his taxi-cab and drove a total distance of 12½ miles, during which the informant required three stops to be made of approximately fifteen minutes each, so that the total time of hiring was one hour twenty-five minutes. Under the schedule of fares and charges for the Auckland City area the fare on a hiring by distance would have been 19s. If, however, the fare for a time hiring applied then the fare would have been 22s. 6d., which was the actual fare demanded. It was admitted that at no time was the basis of the charge discussed between the hirer and the driver, and at no time did the driver, until the end of the hiring, advise the hirer that he would charge for a time hiring.

On an information charging the defendant with demanding more than the exact amount of fare payable under his licence for hiring,

*Held*, 1. That, where the waiting-time exceeds thirty minutes in one continuous period, para. A 4 applies, or the driver may elect to charge on a time basis under para. D 2; but, where the total waiting-time of a series of stoppages in any one journey exceeds thirty minutes in all, the taxi-driver has an election to charge under paras. A or B of the Schedule; and that in neither of these cases is any notice required by the Schedule.

2. That the defendant had properly exercised his election under para. D 2.

INFORMATION charging the defendant, that being the driver of a public taxi-cab he did, at the end of the hiring, demand more than the exact amount of fare payable under his licence for hiring.

The facts were admitted.

The informant engaged the defendant in his taxi-cab and drove a total distance of 12½ miles, during which the informant required three stops to be made of approximately fifteen minutes each, so that the total time of hiring was one hour twenty-five minutes. Under the schedule of fares and charges for the Auckland City area the fare on a hiring by distance would have been 19s. If, however, the fare for a time hiring applied then the fare would have been 22s. 6d., which was the actual fare demanded. It was admitted that at no time was the basis of the charge discussed between the hirer and the driver, and at no time did the driver, until the end of the hiring, advise the hirer that he would charge for a time hiring.

*Henry*, for the defendant.

*Cur. adv. vult.*

WILY, S.M. For the informant it was submitted that, as the charge included more than thirty minutes' waiting-time, and as the driver had at no time inquired of the hirer if he desired him to continue waiting, and had not advised the hirer of his intention to charge on a time-basis, then it became unlawful for the driver to charge for the waiting-time as on the time-hiring basis.

These submissions were based on the provisions of the Schedule B of the Taxi Fare Schedule for Auckland City. This Schedule is divided into Parts A, B, C, and D headed, respectively—A. Hirings by Distance; B. Hirings by Time; C. Hirings for trips beyond the Auckland Transport District; and D. General. Each of these Parts is divided into numbered paragraphs and the paragraphs in issue in this information are:

"A 4. Waiting time shall be charged at the rate of 6d. for every 5 minutes provided that after 30 minutes of waiting the driver must inquire and ascertain that the hirer desires him to continue waiting."

This is the provision relied on by the prosecution. The defendant, however, relies on D 2, which provides:

"D 2 Where the waiting time during any journey exceeds 30 minutes the taxi-cab driver may determine whether the charge shall be by distance or by time."

The defendant submits that para. D 2 must be read as a separate provision entitling the driver, where there is more than thirty minutes of waiting-time in one journey, to elect, without notice to the hirer, whether he will charge at the rate under Part A or Part B.

It would seem that under this schedule of charges provision is made for three different methods of hiring under Parts A, B, and C; and the basis of the charges is automatically fixed at the commencement of the hirings. Part C is outside the issue in these proceedings and need not be further considered. Although A relates to hiring by distance, provision is made under para. 4, referred to above, and para. 9 where any stoppages or waiting in the course of the journey is less than five minutes for the time for such waiting to be charged for on the rate therein provided. It is quite clear that under para. A 4 a wait of over thirty minutes cannot be charged for unless the driver makes the inquiry therein provided. If he makes such inquiry, then, under para. A 4 he may charge the 6d. for every five minutes including the period over the thirty minutes that has been brought into account by the driver's inquiry. In such case, para. D 2 would also seem to apply. This general Part D contains general provisions which must be interpreted to apply to each of the preceding Parts A, B, and C.

If this interpretation is correct, then does para. D 2 give the driver an election as to the basis of the charge, without any notice to the hirer? I can come only to the conclusion that para. A 9 covers individual stoppages of under five minutes, and para. A 4 covers an individual stoppage of up to thirty minutes with a proviso to extend the charges where such individual period exceeds thirty minutes on the performance of the condition required. Where, however, there is a stoppage, or there is a series of stoppages which together exceed thirty minutes, then the general provision of para. D 2 would seem to have a clear meaning in its application to such stoppage or series of stoppages by giving the driver the election as to the basis of the charges. That the periods referred to in A 4 and A 9 relate to individual stoppages seems to be borne out by the wording of the relevant paragraphs. Thus, in para. A 4 it is to be noted that the words are "after thirty minutes of waiting". This is more consistent in meaning one period of time than several periods making in all over thirty minutes. Further, the words "continue waiting" at the end of the paragraph would seem to be applicable to a period that has run on without a break. Again, in para. D 2 the words "waiting time in any journey" are used and these must, I think, be taken to mean waiting-time during the whole period of engagement. The word "journey" is defined as to its commencement in para. A 7, and is used many times in the whole Schedule with a clear meaning to include the whole of the engagement. It is not used in the reference to waiting-time in para. A 4. There is no provision in any case for the driver to give notice to the hirer of the basis of the charge he intends to make. The inquiry needed under A 4 would seem to be only a protective warning to the hirer and requires no more than the inquiry referred to.

I must, therefore, come to the conclusion that where the waiting-time exceeds thirty minutes in one continuous period then para. A 4 applies, or the driver may elect to charge on a time-basis under D 2,

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and also where the total waiting-time of a series of stoppages in any one journey exceeds thirty minutes in all then the taxi driver again has an election to charge under either Parts A or B of the schedule. In neither of these cases is any notice required by the schedule. The defendant properly exercised his election under para. D 2, and the prosecution is accordingly dismissed.

In view of this interpretation, there is no need to consider the further submissions made on behalf of the defendant.

*Information dismissed.*

Solicitors for the defendant : *Wilson, Henry, Sinclair, and Mulvihill* (Auckland).

### IN RE ORAWIA RABBIT BOARD.

1954. July 21, December 9. 1955. January 18. Before Mr. A. E. DOBBIE, S.M., at Invercargill.

*Rabbit Destruction—Rabbit Board—Classification for Levying of Rates—Method of Classification—"Pieces of Land"—Rabbit Nuisance Act, 1928, s. 67—Rabbit Nuisance Amendment Act, 1953, s. 8.*

A Rabbit Board is given a discretion either to rely solely on the power given by s. 65 of the Rabbit Nuisance Act, 1928, to levy a general rate thereunder, or, alternatively, to levy a general rate "on a graduated scale according to a classification" made under s. 67 (as enacted by s. 8 (1) of the Rabbit Nuisance Amendment Act, 1953).

When a Board elects to adopt the latter procedure, it is bound by s. 67 (2) to classify all the land in its district in terms of s. 67 (3), under which it may, having regard to the degree of infestation thereof, and, at the discretion of the Board, having regard to the other matters mentioned in subs. (3), classify the whole land of a ratepayer in one class, or any portion of his land in one class and another portion in another class.

*Palmerston North-Kairanga River Board v. Mayor, etc., of Palmerston North* ((1913) 33 N.Z.L.R. 513) applied.



The words "different pieces of land", used in s. 67 (3) refer to the separate portions of land of the same ratepayer, as well as to the different pieces of land, regarded as a whole, of each ratepayer in the Board's district.

Although the degree of infestation among the different pieces of land is the primary consideration to be given by a Rabbit Board in making its classification, yet so long as it uses its discretionary powers under s. 67 (7) reasonably, it can remove any piece of land from a lower class to a higher class, or *vice versa*, so that the whole of the land of any one ratepayer may be ultimately in one class, whether or not he has almost cleared patches on it. (This must be the position when the Board in the first year or so commences its operations in a district, and is not in a position to say that any portion of an area is free of rabbits.)

APPEAL against the classification of the respective lands of the three appellants (Malcolm Mouat, John Gordon Minty, and Wallace Chamberlain) in Class "A" in the ratepayers' classification list for the year 1954-1955 of the Orawia Rabbit Board.

The main ground of each appeal was that such land had been unfairly classified. Other grounds were set out in the respective notices of appeal, but these were not proceeded with.

The notices of appeal were filed in the Magistrates' Court at Otautau; and, by consent, they were removed for hearing to the Magistrates' Court at Invercargill.

By consent, all three appeals were heard together.

The following facts were, in the learned Magistrate's opinion, demonstrably clear: (a) The Orawia Rabbit Board was constituted under s. 30 of the Rabbit Nuisance Act, 1928, and, by such constitution, it was empowered to levy its general rate on the basis of the acreage of land occupied by the ratepayer. (b) On May 20, 1954, the members (called "trustees" in the minutes) of the Orawia Rabbit Board met and carried the following resolution:

"That the properties of Bates Brothers, A. F. Henderson and E. A. J. Pahl be classified as class 'B' lands and that (the) proportions of rating in class 'A' and class 'B' lands be as two to one respectively."  
"That the common seal of the Board be affixed to the Classification List in the presence of the Chairman and Secretary."

Such resolutions were confirmed at a meeting held on June 24, 1954. The Secretary of the Board in his evidence said:

"I think the Board has assumed that there will be only the three properties classified as class 'B' and that the rest of the land will be in 'A.' There is no resolution as to what is included in class 'A.'"

(c) The ratepayers' classification list produced to the Court showed that the land of Bates Brothers, of Andrew Findlay Henderson, and of E. A. J. Pahl, was classified in class "B," and the remainder of the lands in the district, including that of each of the appellants, in class "A."

(d) The land classified in class "A" carried a rate of 1s. per acre, and that in class "B" of 6d. per acre.

(e) The list showed that Malcolm Mouat had a holding of approximately 1,951 acres, John Gordon Minty of 2,091 acres and Wallace Chamberlain of 4,154 acres.

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(f) The land of the three land-holders in class "B" could be properly described as rabbit-free land.

The chairman of the Board (Mr. MacGibbon) described the method adopted by the Board in making the classification. He said :

"In making the classification we took into consideration infestation, and that was our primary consideration. There were three other facts which we took into consideration, the benefit derived by ratepayers from the activities of the Board, the protection against infestation and reinfestation, and the work done on his own property by a ratepayer in ridding the property of rabbits. These three were of secondary consideration and that of infestation of primary. The reason why we put these three properties in class 'B' as opposed to the properties in class 'A' was that the Board considered that there would not be any work needed on those properties. We did not see any reason to do any work on those properties in the future so we put them in class 'B'."

*In cross-examination* : "I agree that the lands in class 'A' are infested by rabbits in varying degrees."

*Question* : "Do you think it would be fair to take into consideration in the classification the different degrees in which those properties are affected by rabbits?"

*Answer* : "I think it would be fair if it were possible. If you have 126 ratepayers and try to differentiate between each property you are going to have a big job. It would be a bigger job still to divide them into three different classifications. Other Rabbit Boards may do it. I have heard there are some with more than two classifications."

*Question* : "If 1,000 acres of Mouat's property were clear of rabbits what the Board would do would be to include 1,000 acres in 'B' class and the remainder in class 'A'?"

*Answer* : "That would be at the discretion of the Board."

*Question* : "That would be a fair way to classify his land if the 1,000 acres was clear of rabbits?"

*Answer* : "Yes. There is no property classified in two classes—it is either in or out—the whole property in class 'A' or the whole property in class 'B'. The reasons I give for not having classified any single property into class 'A' and class 'B' is that it would involve a lot of work and I do not think it is practicable. There would be no end to classifications under that system. It would be quite practicable in Mouat's case if that 1,000 acres is clear of rabbits. We would classify that 1,000 acres as class 'B' and the balance as class 'A'. That is the way it could be done. I am not in favour of it."

*In re-examination* : "From my knowledge and reports I have had, there are no parts of properties in class 'A' which are comparable with the properties in 'B' or comparable, from the point of view of infestation, with the land of Henderson, Bates, or Pahl."

Arthur, for the appellants.

Mills, for the respondent Board.

*Cur. adv. vult.*

DOBIE, S.M. [After stating the facts as above:] The resolution purporting to classify the land seems to be incomplete in that it is left to inference that all the land not included in class "B" is to be included

in class "A"; but, on these appeals, I do not think I am concerned with the effectiveness or otherwise of such resolution. It is the classification in the list produced, in so far as the appellants are concerned, which comes before me for consideration. The appellants seem to assume their land was classified in class "A."

I think the reasonable inference to draw from the evidence of the chairman of the Board is that the Board classified rabbit-free land in class "B," and all other land in the respective pieces of land in the district, where there was any infestation at all, in class "A."

This brings me to an examination of s. 67 of the Rabbit Nuisance Act, 1928 (as enacted by s. 8 of the Rabbit Nuisance Amendment Act, 1953) under which such classification purports to be made. It provides that:

67. (1) The Board *may* levy any *such* rate on a graduated scale according to a classification made, under this section, of the land upon which the rate is to be levied.

(2) Before making a rate under this section in any year the Board *shall*, by resolution, *classify all* land in its district.

(3) In classifying the land in its district the Board *shall* have regard to the *degree* in which different pieces of land are *affected* by rabbits; and may have regard to—

(a) The *degree of benefit* derived or likely to be derived by any piece of land from the operations of the Board in destroying rabbits on that land or on any other land;

(b) The *risks of infestation or reinfestation* of any piece of land by rabbits from any other land;

(c) The *extent* to which *steps have been taken* by or on behalf of the ratepayer to *reduce or control* the number of rabbits on his land or the movement of rabbits to or from that land;

(d) Such *other circumstances* of whatsoever nature as the Board considers relevant.

(4) The rate shall be made and levied on each class of land in such proportions as the Board appoints.

(5) Every classification so made shall be set forth in a list to be sealed with the common seal of the Board. The classification list shall include a statement of the proportions in which the rate is to be imposed on the several classes of land to which the list relates.

(6) Upon the completion of the classification list the Board shall forthwith cause public notice to be given—

(a) That the classification list has been completed; and

(b) Of the proportions in which the rate is to be imposed on the *several classes* of land; and

(c) Of the place where and the period during which the classification list may be inspected,

and shall allow the classification list to be inspected at reasonable times at that place for a period of not less than twenty-one days.

(7) Any person *aggrieved by the classification* or by the fixing of the proportions specified therein *may appeal* against it on either or both of the following grounds, namely:

(a) That the *land of the appellant*, or any other land in the district, *has not been fairly classified*;

(b) That the proportion of the rate imposed on any class or classes of land is too great or too small.

I think it is quite clear from the use of the words "may" and "such" before the words "levy" and "rate" respectively in s. 67

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(1), that the Board is given a discretion either to rely solely on the power given by s. 65 of the Rabbit Nuisance Act, 1928, to levy a general rate thereunder, or, alternatively, to levy a general rate "on a graduated scale according to a classification" made under s. 67.

I think in these appeals the Board must be deemed to have elected to levy such rate on the alternative method provided by s. 67. Having made such election, the Board was then bound by subs. 2 thereof, by resolution, to classify all land in its district. This the resolution passed and confirmed by the Board purports to do.

The method of classification is set out in s. 67 (3). It requires the Board, in making such classifications, to have regard to the degree in which different pieces of land are affected by rabbits. While it is doing this, the Board may also take into consideration (but this is discretionary) what may be briefly stated as: (a) the benefit derived or likely to be derived from the operations of the Board; (b) the risk of infestation or reinfestation from other land; (c) the steps taken by the ratepayer himself to reduce or control the rabbits on his land or their movement to or from such land; and (d) other relevant circumstances. The words "affected by rabbits", were also used in the now-repealed s. 67 of the Rabbit Nuisance Act, 1928. They were interpreted by *Blair, J.*, in the case of *Munro v. Waihopai Rabbit Board*, (1935) 1 N.Z.L.G.R. 62, as meaning "occupied by" or "infested by" rabbits.

The next question is, what do the words "pieces of land" in such sub-section mean? The words "piece of land" are used in paras. (a) and (b) of s. 67 (3). Do the words mean that the whole land or property of each ratepayer is to be classified as one "piece of land" or that the whole land of each ratepayer is to be divided into separate pieces of land and to be classified according to the degree of infestation of each such piece? If it has this latter meaning, then the land of any one ratepayer could be classified in one or more classes according to the degree of infestation thereof. Section 67 of the principal Act (before its repeal and reenactment by s. 8 of the Rabbit Nuisance Amendment Act, 1953), read as follows:

"The Board may levy rates varying in the different parts of its district having regard to the degree in which such different parts are affected by rabbits."

It would appear that under this section the Board could divide its whole district into different parts, and levy varying rates in such different parts according to the degree of infestation thereof. Under this section, it seems any particular property of a ratepayer could be divided into one or more parts and have varying rates levied thereon. In s. 67 (3) (as enacted by s. 8 of the Rabbit Nuisance Amendment Act, 1953), did the draftsman intend to relate the question of infestation to the different pieces of land in the district irrespective of the ownership thereof? I do not think the sub-section is as wide as that, for its later permissive powers refer of necessity to the land of one ratepayer. It is he who would have received the benefit of the Board's work, or who had taken steps to reduce rabbits on his land, or whose land would be subject to reinfestation. But, where the land of one ratepayer can in a practical way be divided into two or more pieces of land for the purposes of a proper classification, I think it can and should be so divided. This must of necessity be so where the land of one ratepayer is divided into pieces by the land of another ratepayer. In the *Concise Oxford Dictionary*, the words "piece of land" has, as one of its meanings—"an enclosed portion of (land)", and the word "enclosed" in the same *Dictionary*

has, as one meaning, "fenced in". In its literal meaning, the words "different pieces of land" could mean "different fenced-in portions of land"—that is, a holding could have varying classes according to the degree of infestation thereof.

It is to be observed that the draftsman in paras. (a) and (b) of subs. 3 uses "piece of land", and in para. (c) he uses "his land" meaning the whole land of the ratepayer. Under para. (c), one of the principal steps taken by a ratepayer to control rabbits or to prevent the movement of rabbits to or from his land would be the erection of rabbit-proof fences on his boundaries, and, consequently, such paragraph is made to refer to his whole land, whereas in paras. (a) and (b) the benefit derived or likely to be derived, or the risks of infestation or reinfestation, may be properly related to the particular piece of land in the holding so classified.

I conclude, therefore, that subs. 3 means that the Board may classify the whole land of a ratepayer in one class, or any portion of his land in one class and another portion in another class having regard to the degree of infestation thereof, and, at the discretion of the Board, having regard to the other matters mentioned in such sub-section. In the case of *Palmerston North-Kairanga River Board v. Mayor, etc., of Palmerston North* ((1913) 33 N.Z.L.R. 513), in which s. 93 (1) of the Rivers Boards Act, 1908, which provided—

"(1) In districts where rates are to be levied on lands according to their classification the Board from time to time, as it thinks fit, may classify . . . all lands in the district, both town lands and country lands, into the following two or three classes, at the discretion of the Board, that is to say—(a) lands liable to great actual damage: (b) lands liable to less actual damage: (c) lands indirectly liable to damage."

was interpreted by *Sir Robert Stout, C.J.*, who said:

"The question is, suppose a man owns a block of land, must it as a whole come under one of the classes (a), (b), and (c) in section '93, . . . Or may part of his land be under (a), part under (b), and part under (c)? It was contended for the defendants that, 'as the valuation rolls are made up under the Valuation of Land Act, 1908, and as these rolls must be used by the River Board . . . the property of an owner must be all in one class. If that is so, it is, I think, clear that effect cannot be given to the provisions in the statute for the classification of lands for rating. There is nothing in the Act controlling the wide powers to classify lands conferred on the Board by section 93 and the following sections. . . . I am, therefore, of opinion that question 3 must be answered—that any separate property may be divided—that is, classified—that under (a), part under (b), and part under (c) in section 93 of 'the River Boards Act.' (*ibid.*, 519, 520).

Although the classes into which the different pieces of land in the Rabbit Board District may be classified are not set out in s. 67, I think it suggests two or more classes, such as: (a) pieces of land infested by rabbits; (b) pieces of land lightly infested by rabbits; and (c) pieces of land free of rabbits. This would give effect to the force of the word "degree" therein. But, of course, in so classifying such pieces of land, the Board may take into consideration the other matters set out in subs. 3. The result of this further consideration could be that the land would revert to a higher or lower class, as the case may be, so that in the end there may be only two classes.

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In the early stages of the Board, when its work is intensive over the whole district, I do not think it is bound in law to make more than two classes, for example: (a) land affected, whether lightly or otherwise, by rabbits; and (b) land not affected by rabbits. That would be having regard to the degree in which different pieces of land were affected by rabbits; for some would be affected and some would not be affected. The non-affected land must fall into some class, for if it did not, that would not be classifying *all* the land in the district as the Board is required by subs. 2 to do. The further classification of the infested land into more classes may depend, in my opinion, on how the Board determines to use its discretionary power under the remaining considerations given to it under subs. 3. For example, the Board may determine that some lightly-infested land is subject to reinfestation, and it cannot, at present, be removed from a general classification as infested land into a lower class; or it may determine that, while there is work to be done on a property, it cannot remove it to a lower class if this would prevent it from functioning for want of funds. This, I think, would be a relevant circumstance under subs. 3 (d).

Rabbit Boards were established for the purpose of destroying rabbits in the district, and the collection of sufficient revenue to effect that purpose is necessary. It is clear from the decision in *Munro v. Waihopai Rabbit Board* (1935) 1 N.Z.L.G.R. 62, that, where there are two or more classes, rabbit-free land cannot be placed in the highest class: that would not be giving effect to s. 67 of the principal Act. I do not think that the above interpretation of the words "pieces of land", as referring to the respective portions of a ratepayer's property, is affected by the use of the words in para. (a) of s. 67 (7) of the Rabbit Nuisance Act, 1928, namely,

"that the *land* of the appellant . . . has not been fairly classified."

I think the word "land" therein is used in a more general sense as including any land so classified as aforesaid, which the appellant considers to be unfairly classified. If a ratepayer owns two properties separated by another ratepayer's land, one of which could be properly classified in "A" and the other in "B", in my opinion, it would be quite unfair to put both properties in "A".

I conclude, therefore, that the words "different pieces of land" in s. 67 (3) refer to the separate portions of land of the same ratepayer, as well as to the different pieces of land, regarded as a whole, of each ratepayer in the district.

Mr. *Arthur* contends (1) that the Board made no attempt to classify the land of individual ratepayers having regard to the degree in which such land was affected by rabbits, and (2) that the Board made no attempt to classify the different pieces of land of each individual ratepayer having regard to the degree in which each such piece of land was affected by rabbits, and consequently, such classification is unfair. These contentions involve an examination of the facts. The question finally to be answered in each appeal is: Has the land of the appellant been fairly classified? The burden of the proof of that is on the appellant. Used in the context in which it is used, I think the word "fairly" means simply "justly".

I think the following facts are clear:

- (a) The classification was made by the Board.
- (b) The members of the Board called to give evidence had a know-

ledge of the area classified, and, in the case of the Chairman, at least, such knowledge had been acquired by observation over a long period of years.

(c) The members had the advantage of past monthly reports of their foreman, although no special report was called for from him at the time the classification was made.

(d) The members in meeting considered the classification. The Chairman said they took the degree of infestation as a primary consideration and the benefit received by the Board's operations, the risk of infestation or reinfestation and the steps taken by the ratepayer to free his property of rabbits as a secondary consideration.

(e) The Board made no attempt to divide the land of any one ratepayer for the purpose of making a classification on each piece of land therein affected by rabbits. The whole property went into one class or the other.

(f) The Board considered that, if the land were in any way infested by rabbits, and if work was still to be done thereon, it must go into "A" class; but that, if the land was entirely free of rabbits, but had no work done on it, and was not likely to have any work done on it in the near future, it must go into "B" class. The result was that 123 properties went into class "A", and three into class "B".

(g) The evidence clearly demonstrates that the properties in class "B" have been fairly classified.

(h) The evidence also clearly demonstrates that the 123 properties in class "A" have varying degrees of rabbit infestation thereon.

Examining the evidence with reference to the land of each appellant, I think the clear inference to be drawn therefrom is that:

(a) The land of each appellant has difficult patches from which the more or less cleared paddocks can be reinfested and that each of the so-called cleared paddocks have some rabbits on them.

(b) In particular, the evidence proves that:

Mr. Mouat has 1,000 acres of scrub-land with rabbits on the edges thereof. Of the remaining portion of his land, there are rabbits in the gorse and scrub in the deep gullies. Because of the scrub and gorse on his property, it is difficult to clear of rabbits. So long as there are rabbits in the scrub and gorse, the more or less clear land on his property will be subject to reinfestation from such localities. The appellant admitted there could be reinfestation from such sources. His land has always been classified in "A" class. He has done some work himself in clearing the rabbits from his property. In so far as the cost of the work done by the Board on his property is considered, it has spent approximately £5 more than it has taken from him in rates. Taking into consideration the degree of infestation on his property, it is below the average of the remaining properties in class "A". That briefly sums up his position.

Mr. Minty has a ridge of 291 acres in the middle of his property which is badly infested with rabbits, and there are some rabbits on the remainder of his property in the scrub. The more or less clear lands on his property are subject to reinfestation from the ridge and pockets of rabbits in the scrub. Although last year on a general rate levied under s. 65 his property was classed in "B", and a lot of work has recently been done on it by the Board, it remains still one of the worst risks for reinfestation from the sources previously indicated. He has done some work himself in controlling or clearing rabbits from his property. The Board has expended more on his property over the

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period of its operations than it has received in rates. The cost of labour has been £583 7s. 6d., the approximate cost of the other services is approximately one-third of that of labour and it works out at £194 6s. 6d. The Board so far has received in rates £209 2s. 8d., leaving a deficit of £568 11s. 4d. It is obvious from these figures that other ratepayers are being asked at present to carry portion of the cost of the work done on his property. Taking into consideration the degree of infestation on his property, it is above the average of the properties classed as "A" in the list.

Mr. Chamberlain : Of the 4,154 acres owned by Mr. Chamberlain, he has 2,500 acres, which, he says, are covered with dense scrub and such land is wholly unproductive. He admitted that his property was infested, but not badly infested ; and that there were a few rabbits on a particular part of it. He admitted that there was still work to be done on his property to keep the rabbits down. He also admitted that there are a lot of ratepayers in class "A" with less rabbits than he has. The difficulty he is in is that he has a large area of unproductive land upon which the method of rating on the acreage basis places a heavy burden. He has done a lot of work on his land to clear it of rabbits. The Board has also done a lot of work on his land. It has expended in wages £296 17s. 1d., costs of material, etc., £98 19s. 2d., and he has paid in rates £391 2s. 4d., leaving a deficiency of £4 13s. 11d. on these operations. His property is subject to reinfestation particularly from the face, and is about the average of those classified "A".

Section 67 (7) gives a person aggrieved by the classification the right to appeal against it upon the ground that the land of the appellant has not been *fairly* classified. The use of the word "fairly" seems to indicate not only that the classification of the land itself must be fair, just, or equitable, but also that such classification must be duly made in accordance with the requirements of the section. Subsection 11 provides that

"Every classification list . . . signed by a Magistrate in the case of any such appeal as aforesaid, shall, for the purpose of any proceedings for the recovery of rates, be sufficient evidence of a classification *duly made* by the Board in accordance with the requirements of this section . . ."

This clause is evidentiary, but it does indicate that the section requires a classification to be "*duly made* by the Board in accordance with the requirements of this section". I understand this latter question, namely, whether the classification was duly made in accordance with the requirements of the section to be the gravamen of Mr. Arthur's contention. Upon the evidence, he cannot and does not, seriously contend that, on a comparison with the other properties placed in class "A" or class "B", some, at least, of each appellant's land has been "fairly" placed in class "A". For the balance of such land, he contends that the Board did not have regard, as it is required to do by the first paragraph of subs. 7, to the degree in which the different pieces of land of each ratepayer were affected by rabbits, that is, the Board did not divide the land into different pieces for the purposes of its classification. The chairman of the Board, speaking about that, said that would be impracticable, and I understood that to have reference to the time at which the classification was made. The evidence does not prove either that any piece of land of the appellant's property was entirely free from rabbits, or that, on such pieces as were almost free from rabbits, steps had been taken by the landowner to control the movement of rabbits from his



other infested land to those pieces. The only effective control would be the erection of rabbit-proof fencing around the almost-cleared area to prevent the reinfestation thereof. One landowner, who is also in "A" class and does not object thereto, gave evidence that he had done that on portion of his property at a cost of £700.

I think, although the degree of infestation amongst the different pieces of land is the primary consideration to be given by the Board in making its classification, yet so long as it uses its discretionary powers under s. 67 (7) reasonably, it can remove any piece of land from a lower class to a higher class, or *vice versa*, so that the whole of the land of any one ratepayer may be ultimately in one class, whether he has almost cleared patches on it or not. This must be the position when the Board in the first year or so commences its operations in a district, and is not in a position to say that any portion of its area is free of rabbits. I do not doubt that, in these particular classifications, the Board took into consideration the risk of reinfestation of the more or less clear areas from the infested areas, the benefit the property-owner had derived from their operations and was likely to derive in the future, the steps taken by the landowner to free or control rabbits on his property, and the revenue required to continue its operations over the whole district, which, I think, is a relevant circumstance under para. (a); and that, taking the degree of infestation into consideration as a primary matter, those other matters removed the more or less clear areas back into the category of an infested area so far as a classification thereof was concerned. In their words, if there were rabbits still on the property and work had to be done thereon, then the property went into class "A". In this, I do not think they were unreasonable, for, if the Board does not get the revenue to carry its operations to fruition, then the work done up to the present will be done in vain. Up to the present, none of these appellants has been called upon to pay out more money in rates than he has received by way of the cost of services expended on his property, to free it from rabbits.

For the above reason, I conclude, therefore, that the land of each appellant has been fairly classified.

The list will, therefore, be confirmed without amendment. No order is made as to costs.

Solicitors for the appellants: *Hanan, Arthur, and Co.* (Invercargill).

Solicitors for the respondent Board: *Macalister Bros.* (Invercargill).

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GRAHAM AND OTHERS *v.* MT. EDEN BOROUGH.

1955. April 1, 21, before Mr. H. Jenner Wily, S.M., at Auckland.

*Rates and Rating—Valuation Roll—Annual Value—Rent of Dwelling-houses subject to Restrictions of Tenancy Act, 1948—Annual Value Assessed in Excess of Rent received by Landlord—Annual Value to be assessed on Basis of New Valuation not on Existing Government Valuation—Value of Fee Simple not subject to any Deduction on Account of Tenancy subject to Tenancy Act, 1948—"Rateable Value"—Rating Act, 1925, ss. 2, 8 (4).*

The fair rent that is fixed under the Tenancy Act, 1948, cannot be taken as the annual value for the purposes of the Rating Act, 1925, as the considerations affecting the real tenant under the first-named Statute do not apply to the hypothetical tenant under the Rating Act, 1925.

*Dunedin City Corporation v. Young* (1941) 4 N.Z.L.G.R. 72) applied.

The provision in para. (a) of the definition of "Rateable value" in s. 2 of the Rating Act, 1925, as to valuations on the annual value, which is in no case to be "less than five per centum of the value of the fee simple thereof" requires that a new valuation of the fee simple of property must be made, and used, if necessary, not only as a check to such rateable value but also to increase that value, if needs be; and that, consequently, such five per centum is not to be calculated on the existing Government valuation of the property.

*In re the Rating Act, 1908, and Re Baigent* (1920) 15 M.C.R. 62) disagreed with.

As the basis of valuation on the annual value is the value of the estate or interest of the owner therein, and a weekly or monthly tenant, as such, has no estate or interest in the land, the whole of the value of the fee simple should be assessed against the owner of the property, without any rebate or reduction by reason of the fact that the property is let to a tenant who is protected under the Tenancy Act, 1948.

*Findlay v. Valuer-General* (1954) 8 N.Z.L.G.R. 270) applied.

QUESTION OF LAW arising out of objections to valuation on annual value basis of certain dwellinghouses subject to the Tenancy Act, 1948.

The issue in this group of objections was whether or not a tenanted property should be assessed on the rental actually paid under the restrictive provisions of the Tenancy Act, 1948, or whether it should be assessed on a hypothetical rent even though the latter rent may be in excess of what is being so paid. In all this group of cases the properties concerned were dwellinghouses subject to tenancies and objections were lodged by the landlords against an increase in the valuations for the purposes of the Rating Act, 1925. The Mt. Eden Borough for some

some time past had adopted the system of rating on the annual value and it would appear that in the new valuation prepared by the Council's valuer the annual value of the properties concerned in these applications had been assessed at more than the actual rents being received by the landlords from their respective tenants. In Mr. Graham's case, the annual value was assessed at £87 which would be equivalent to a rental of £2 2s. a week (approximately) or alternatively to a capital value of £1,740. The basic rent of this property which had been paid for some four or five years was £1 15s. and the 1952 Government Valuation was £1,430.

Rennie, for the objectors.

Borough Valuer in person.

*Cur. adv. vult.*

WILY, S.M. Counsel for the objectors submits that the "rateable value" as defined under para. (a) of the interpretation of these words in s. 2 of the Rating Act, 1925, is limited to ascertained rent as actually being paid under the protected tenancy, i.e., £1 15s. per week or £91 per annum less 20 per cent. which gives an annual value of £73. He further submits that the value of the fee simple is limited to the capital value as appearing on the Government Valuation Roll, and this Court is limited in its minimum assessment to 5 per cent. of that valuation of £1,430, which is also £73. In support of this submission, counsel relies on *Smith v. Lower Hutt City Council* ((1945) 6 N.Z.L.G.R. 116) and *MacDuffs, Ltd. v. Lower Hutt City Corporation* ((1947) 6 N.Z.L.G.R. 259).

"Rateable value" is defined in s. 2 of the Rating Act, 1925, as

"(a) In respect of property within any district where the system of rating property on its annual value is in force, means the rent at which such property would let from year to year, deducting therefrom twenty per centum in case of houses, buildings, and other perishable property, and ten per centum in case of land and other hereditaments, but shall in no case be less than five per centum of the value of the fee-simple thereof."

Dealing, first, with the effect of the Tenancy Act, 1948, in respect of which counsel relies on the decision in *Smith v. Lower Hutt City Council* ((1945) 6 N.Z.L.G.R. 116). In that case, in an oral judgment, *Goulding, S.M.*, stated that it was impossible to disregard the provisions of the Fair Rents Act, 1936, when assessing annual value under this Act. He then would appear to have assessed the annual value as if for a fair rent on a value of £2,250, being the purchase price of the house. There does not appear to have been any other evidence of value except the purchase price actually paid. Little assistance can be gained from this decision as the facts are not stated in any detail, and it appears that the annual value so determined was considerably lower in proportion to the whole than what was actually being paid as a rent for approximately half of the premises.

The same learned Magistrate, however, in the later case of *MacDuffs, Ltd. v. Lower Hutt City Corporation* ((1947) 6 N.Z.L.G.R. 259) reviewed the authorities in detail and came to the conclusion that he could see no reason to alter the view expressed in *Smith's* case and stated: "In assessing properties for rating purposes, in my opinion, a valuer must take these matters into consideration. I have no doubt that there will be differences of opinion amongst valuers as to the effect upon the hypothetical tenant of the legislation. That is inevitable" (*ibid.*, 267).

From the facts as set out in the judgment (*ibid.*, 261) it would appear that the annual value of MacDuffs' property valued as if the rent was paid under the Economic Stabilization Emergency Regulations, 1942, would have been £876 12s. 6d. MacDuffs' property was not let to a tenant, but part of the adjoining and similar property of A. & W. Smith, Ltd., was tenanted, and, there being no satisfactory capital values of these properties submitted, the learned Magistrate accepted the rental actually being paid for portion of Smith's property as being comparable and then amended the two assessments for the whole of these two properties by accepting the rent actually being paid for part of one as the comparable hypothetical annual value of the properties (*ibid.*, 270). As a result MacDuff's property was fixed at £990 rateable value, being a figure considerably in excess of the rental value as if fixed under the Economic Stabilization Emergency Regulations. There was no evidence before the Court that a fair rent had been fixed for the tenants of Smith's property.

If my interpretation of these facts is correct, then it would seem that although it was decided in *MacDuffs'* case that, although the effect of the Fair Rents Act, 1936, and the Regulations referred to above must be taken into consideration, that can only be as to their general effect on hypothetical rents, and that annual values are not assessed as on a fair rent basis as was done in *Smith's* case, but on a comparative basis with other properties in the locality. It would seem that to take the rent that is actually being paid is not the proper basis of assessment. This was clearly pointed out by the Court of Appeal in *Dunedin City Corporation v. Young* ((1941) 4 N.Z.L.G.R. 72), where the late *Sir Michael Myers, C.J.*, in delivering the judgment of the Court stated: "The basis of rateable value of a property is not the rent that is being paid by the actual lessee or tenant to the owner of the property, but the rental which a hypothetical tenant would be prepared to pay on the basis of a tenancy from year to year" (*ibid.*, 77).

The valuer has a duty under s. 8 (4) of the Rating Act, 1925, to prepare his valuation list on or before January 15 of the year in which the valuation is to be made "setting forth the rateable value, according to the best of their [his] skill and judgment", and, under subs. (6) of that section, he is given power to enter on land "for the purpose of valuing the same". I do not think that there can be any doubt that under the provisions of s. 8 the valuer must prepare his valuation of the individual properties on his list and for this purpose must make his own valuation of the rental value of each property whether tenanted or otherwise. As was stated by *Kennedy, J.*, in *Dunedin City Corporation v. Hames* ((1947) 6 N.Z.L.G.R. 341), after he reviewed many of the authorities: "The general result of these authorities seems to me to necessitate this—namely, (a) that the valuer should value the premises as they are, with all advantages and disadvantages . . ." (*ibid.*, 367).

In this case, the question of the valuation of licensed premises was before the Court of Appeal particularly in relation to the goodwill thereof and the judgment of the Court of Appeal is briefly as set forth in the headnote, namely:

"Where the system of rating on the annual value is in force, the local authority and its valuer are entitled to treat and envisage licensed premises as premises which will continue to be licensed, and to value them as they are, taking into account any enhancement in value due to the existence of a licence and as premises to which a good-

will in respect of the business therein conducted attaches if, in fact, any such goodwill does attach; . . ."

From this decision, also, it is clear that the valuer must value premises as they are with, in this case, the advantages attaching thereto. Thus it would seem that, if, by virtue of the protection given by the Licensing Act, 1908, premises are enhanced in value due to the existence of a licence under that Act affecting those premises, then premises which may have disadvantages resulting from the restrictive provisions of the Tenancy Act, 1948 (which replaced the Fair Rents Act, 1936, and the Economic Stabilization Emergency Regulations, 1942), may be lessened in value as a result thereof. It has been held in England by the House of Lords in *Poplar Assessment Committee v. Roberts* ([1922] 2 A.C. 93) that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is not to be taken into account in determining the value for rating purposes; but I agree with the consideration given to this case by the learned Magistrate in *MacDuffs, Ltd. v. Lower Hutt City Corporation* ((1947) 6 N.Z.L.G.R. 259, 264-266) where he concluded that the effect of the Rent Restriction Acts of England was very materially different from the effect of the Fair Rents Act and the Regulations in New Zealand. Material changes were made in the law as it applied in *MacDuffs'* case by s. 9 of the Tenancy Act, 1948, as amended by the Tenancy Amendment Act, 1953, in the fixation of a fair rent and the definition of "special circumstances"; but this is in the method of computation of the fair rent and does not appear to affect the principle involved in this assessment. Under that Act, all properties let to tenants (with only minor exceptions) are subject to the provisions of Part II of the Act and are therefore subject to the fixation of a fair rent under the provisions of that Part. Thus the annual rent a hypothetical tenant would be prepared to pay for the right to occupy any property on the basis of his being a tenant from year to year is subject to adjustment under this Act if he concludes a contract of tenancy with the owner thereof. All premises, whether now let or to be let in the future, are so subject; and to this extent I agree with the decision in *MacDuffs'* case that the effect of this Act cannot be disregarded. It is a restriction that attaches to all properties if and when let, and may even under s. 8 (7) apply to a prospective letting. As a result, rental values must have some relation to the rent that could be fixed as a fair rent under that Act. However, that is the extent of the effect of that legislation. The fair rent that is fixed under the Tenancy Act, 1948, cannot be taken as the annual value for the purposes of the Rating Act, 1925. The considerations affecting the real tenant under the former Act do not apply to the hypothetical tenant under the latter Act. The rent actually being paid is not the basis for assessment of annual rent (see *Dunedin City Corporation v. Young, supra*) and, further, such rent may be a basic rent under the Tenancy Act, 1948, which may be above or below a fair rent allowed under that Act or it may be a fair rent as determined by that Act when many other relevant matters *per se* of the parties must and might have been brought into consideration. Such rent may or may not happen to coincide with the hypothetical rent required under the Rating Act, 1925.

Thus, to summarize, it would appear that although the Tenancy Act, 1948, may by its general application affect generally the hypothetical annual rent to be determined under the Rating Act, 1925, the rent actually payable for a property subject to the Tenancy Act, is not the rent to be taken as the rateable value of the property concerned.

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The valuer appointed under s. 8 of the Rating Act, 1925, has a duty to value independently all properties included on his valuation list, bearing in mind as stated by Lord Atkinson in *Poplar Assessment Committee v. Roberts* ([1922] 2 A.C. 93, 109) "that equality of rating is and should be one of the main objects of all rating systems."

While the assessment of the hypothetical annual rent is the primary object of the valuation, the second portion of the definition of class (a) of "rateable value" in s. 2 of the Rating Act, 1925, must also be borne in mind and used, if necessary, not only as a check to such rateable value but also to increase that value if needs be, *i.e.*, the provision that the annual value shall in no case be less than five per cent. of the value of the fee simple. Counsel in this case submits that such five per cent. must be calculated on the existing Government valuation of the property, and relies on the judgment in *In re the Rating Act, 1908, and Re Baigent* ((1920) 15 M.C.R. 62), where the learned Magistrate so held. I do not agree with this judgment. The Rating Act, 1925, makes it quite clear that for rating on capital value or unimproved value, as defined in s. 2, the valuation appearing on the valuation roll is to be taken as such rateable value. A different phraseology is used where the annual-value system is in force, *i.e.*, the value of the fee simple. The Act itself then makes special provisions for valuations required for such annual-value systems, and provides under s. 7 for annual or triennial valuations and under s. 8 for the appointment and duties of valuers, already referred to earlier in this judgment. The Legislature, in incorporating a different phraseology, did so for some purpose; and that purpose is made clear by the provisions of ss. 7 and 8 above referred to which provide for the appointment of a valuer by the local authority concerned for the purpose of carrying out an annual or triennial valuation. To assess the hypothetical rent it is necessary for the valuer to work from some valuation of the property, and, if the Legislature had intended him to be bound by the existing Government valuation, it could have so provided. It did not do so; in fact, it went further and gave the valuer a legal right of entry for the purpose of valuing the land or premises. It is clear that the learned Magistrate in *MacDuffs'* case regarded the then Government valuation as quite unreliable. The valuer may submit his own valuation of the premises, and the Court is not bound to accept the valuation as appearing on the valuation roll made under the Valuation of Land Act, 1951. Such Government valuation may be outside the annual or triennial period and in some cases may be much earlier in point of time and, therefore, unreliable. This view is further confirmed by s. 8 (1a) of the Rating Act, 1925 (added by s. 2 of the Rating Amendment Act, 1954), which enables the local authority to appoint the Valuer-General as valuer if the Valuer-General so agrees.

This raises a further point as to whether the valuer, in so assessing his value of the fee simple, should allow any rebate or reduction by reason of the fact that the property is tenanted by a tenant protected under the Tenancy Act, 1948. The value to be adopted is the value of the fee simple, and no provision is made for the reduction of any charges. The basis of the assessment of value is the value of the estate or interest of the owner therein. A weekly or monthly tenant as such has no estate or interest in the land that gives him a rateable value; and thus the whole of the value of the fee simple should be assessed against the owner of the property: see *Findlay v. Valuer-General* (1954) N.Z.L.G.R. 270 where a similar decision was made in an appeal under the Valuation of Land Act, 1951. It is possible that the five per cent. of the value of the fee simple

may be greater than the rent payable under the Tenancy Act, 1948, but provision is made under that Act that would avoid any hardship that may result. It will be noted that, under s. 9 (3A) (b) of that Act, any increase in rates is to be "deemed a special circumstance" for an increase of the rent to cover such increase of rates, and thus the equality of the burden for the rates payable on the property is borne by the person who is enjoying the occupation thereof and the amenities provided therefor by the local authority.

I, therefore, disallow the legal submissions made by counsel on behalf of the parties objecting. The objections may proceed to a hearing on any other point that counsel desires to bring forward.

Solicitors for the objectors, Graham and others: *Rennie, Cox, and Garlick* (Auckland).

Solicitors for the objectors, Melville and others: *Melville, Churton, and Brainsby* (Auckland).

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IN RE PUKEMIRO COLLIERIES, LIMITED.  
IN RE QUEEN'S ARCADE, LIMITED.

1955. May 5, 17, Auckland City Assessment Court. Before Mr. H. JENNER WILY, S.M., Chairman.

*Rates and Rating—Valuation Roll—Annual Value—Award limiting Amount of Rent chargeable to Worker—Premises valued at Higher Rental Value—Comparative Rentals in Valuation District not subject to or limited by Restriction placed on Individual Letting of Any Particular Premises—Rating Act, 1925, c. 2.*

An award provided that if an employer provided a worker with living accommodation of a certain minimum standard, such employer might not deduct more than 15s. a week from the worker's wages as rent, or charge the worker more than that sum as rent.

Each of the owners of two premises had let such accommodation to caretaker employees at the maximum rent allowed by the award.

The City Valuer assessed the annual rental value of the premises so occupied at £62, being equivalent to a hypothetical weekly rental of £1 10s.

On objections by such owners,

*Held*, 1. That, by its own election or choice, and for its own benefit, the owner of the premises in each case had selected a particular class of person as its tenant, and it was prepared to take a less rental than a hypothetical tenant might reasonably be expected to pay by reason of the value of the premises.

2. That the comparative rental value of one property with another in any rating district cannot be subjected to or limited by any

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restriction placed on an individual letting of any particular premises by reason of some special circumstance peculiar only to the parties to that letting, as distinct from restrictions relating to the property itself.

The objections were accordingly dismissed.

OBJECTIONS to valuations, made under the Rating Act, 1925.

The issue in these two objections was identical. Both objectors owned and were the landlords of large city premises occupied by many tenants; and, in each case, a flat at the top of the respective buildings was let to a caretaker. Under Cl. 3 (b) (i) of the Northern, etc., Cleaners, Caretakers, Lift Attendants and Watchmen's Award, 1947 (47 Bk. of Awards 3187, 3190) it is provided that if an employer provides a worker with living accommodation of a certain minimum standard, such employer shall not deduct a greater sum than 15s. per week from the worker's wages as rent, nor charge the worker more than 15s. rent.

In both the premises, the owners had such accommodation let to caretaker-employees at the maximum rent allowed under the award of 15s. per week. The City Valuer assessed the annual rental value of the premises so occupied at £62, being equivalent to a hypothetical rent of £1 10s. per week.

*Donne*, for Pukemiro Collieries, Ltd.

*Southwick*, for Queen's Arcade, Ltd.

*G. P. H. Hanna*, for Auckland City Corporation.

*Cur. adv. vult.*

WILY, S.M. Counsel for the objectors submit that the limitations of the award as to the rental obtainable is a disadvantage attaching to the premises such as is referred to in *Dunedin City Corporation v. Hames* ((1947) 6 N.Z.L.G.R. 341, 367) and also as referred to in my more recent judgment in *Graham v. Mt. Eden Borough* (*ante* p. 184). Counsel for the respondent, however, submits that the election to allow the caretaker to occupy the premises is an optional choice by the owner of the buildings, and that the restrictions in the award cannot affect the first general principle of rating that the burden of rates is to be borne equally in accordance with the value of the rent payable by a hypothetical tenant or the value of the fee simple. In the course of his submissions, he referred to *Bomford v. South Worcestershire Assessment Committee* ([1947] 1 K.B. 575; [1947] 1 All E.R. 299) and to an unreported decision by *McKean, S.M.*, in *Re J. B. Donald and Auckland City Council*, (Auckland: 1933 (not reported)).

In the *Bomford* case, certain dwellings were agricultural properties under the Local Government Act, 1929 (Eng.), and were let to employees at the rate of 3s. per week, which rental was a maximum fixed under the Agricultural Wages (Regulation) Acts, 1924, and 1940 (Eng.). The local authority assessed the annual rate at 5s. per week, which was confirmed by the Assessment Court; and, on appeal to Quarter Sessions, a case was stated to the Court of Appeal, which upheld the decision of the Assessment Court. This case is not wholly in point with the present case; but the same general principles apply and the remarks of *Tucker, L.J.*, are fully in point where he states: "To begin with, it would be



"a surprising result, from the rating point of view, if an Act fixing the remuneration of agricultural workers had had the effect of fixing one uniform gross value for all kinds of hereditaments of different sizes and types in Worcestershire merely because they were occupied by a particular class of person." (*ibid.*, 582, 301).

It would appear to me that, by its own election or choice and for its own benefit, the owner of the premises in issue here has selected a particular class of person as his tenant. By such selection it may well be, although I am not informed on this point, that the owner of these premises obtains some further benefit for himself other than the 15s. rental, and for his other tenants, by having a caretaker resident on the premises. For this reason, he may be prepared to take less rental than a hypothetical tenant would pay, and which the City Valuer submits could be obtained by reason of the value of the premises.

In *Re J. B. Donald and Auckland City Council*, referred to above, the same issue as in these present cases was considered by the learned Magistrate. He stated that "For the purposes of a rating assessment the tenant is hypothetical and so also is the rent. The rent actually received is not the conclusive factor although it is in most cases taken to be the rent that this hypothetical tenant might reasonably be expected to pay. It has been held, however, that for rating purposes the word 'rent' means something which is not conditioned by the legal relations existing between an actual landlord and an actual tenant. When there are conditions affecting or limiting the receipt of the rent in the hands of the landlord, those conditions must be disregarded. . . Realities are frequently disregarded in the attempt to ascertain what the hypothetical tenant might reasonably be expected to pay. The limitation imposed by law on the landlord in the case before me prevents the landlord from making his tenant pay more than a certain sum, but the rateable value of the property is not limited by the maximum amount chargeable under the award".

With this conclusion, I respectfully agree. The equality of the burden of rating can be achieved only by the comparative rental value of one property with the other in any rating district; and such rental value must not be subjected to nor limited by any restriction placed on an individual letting of any particular premises by reason of some special circumstance peculiar only to the parties to that letting, as distinct from restrictions relating to the property itself.

Both objections are accordingly dismissed.

*Objections dismissed.*

Solicitors for the first objector: *Morpeth, Gould, Wilson, and Dyson* (Auckland).

Solicitors for the second objector: *Nicholson, Gribbin, Rogerson, and Nicholson* (Auckland).

Solicitors for the Auckland City Corporation: *Butler, White, and Hanna* (Auckland).



## IN RE TONSON.

1955. April 1; May 11, before Mr. J. B. THOMSON, S.M., at Wellington.

*Public Health—Food Hygiene—Application for Registration of Shop for Sale of Food—Requisition by City Corporation's Chief Sanitary Inspector as to Work to be done, in compliance with Regulations, before Issue of Licence approved—Appeal by Shopkeeper to Medical Officer of Health declined—Application to Magistrate on Appeal against such Refusal—Inspector's Requisition not a "decision" under Regulations—No Primary Right of Appeal to Medical Officer of Health—Appeal to Magistrate not available—Food Hygiene Regulations, 1952 (Serial No. 1952/74), Reg. 68.*

The jurisdiction of a Magistrate, under Reg. 68 (2) of the Food Hygiene Regulations, 1952, to hear an appeal from a decision of the Medical Officer of Health depends on the existence of a primary right of appeal under Reg. 68 (1) to that Officer.

Consequently, such an appeal to a Magistrate does not lie where the decision of the Medical Officer of Health was the declining of the hearing of an appeal from a requisition of a Chief Sanitary Inspector, who, upon the receipt of an application for registration of a shop to sell food, required the shopkeeper applicant to comply with the Food Hygiene Regulations, 1952, before his application would be considered, as the Inspector's requisition was not a "decision or requirement of an Inspector" on a matter placed by the regulations within his discretion.

APPLICATION to a Magistrate under Reg. 68 (2) of the Food Hygiene Regulations, 1952. In substance, the applicants having unsuccessfully appealed to the Medical Officer of Health against the decision of an Inspector, appealed to a Magistrate against the decision of the Medical Officer of Health.

The facts sufficiently appear from the judgment.

*Watterson*, for the applicant.

*A. B. Thomson*, for the Wellington City Corporation.

*Birks*, as *amicus curiae*.

*Cur. adv. vult.*

THOMSON, S.M. The appellants conduct a grocer's shop in which are sold (in addition to ordinary groceries) bacon, sausages, luncheon sausage and cooked ham. By reason of the fact that the premises are to this extent used for the sale of meat and probably also because the shop is a "delicatessen" under Reg. 4 an application for registration was made to the Wellington City Council under Reg. 10 and the City By-laws on December 2, 1954. This application for registration is of itself unimportant to the present proceedings; but the response to it was a letter under the hand of the Council's Chief Sanitary Inspector.

This letter stated that "the following work is required to be carried out in accordance with the regulations under the Health Act, 1920,

"and the City By-laws, in order that the issue of a licence may be approved or the premises continued in use for any purpose connected with the sale or preparation and storage of food for sale". It then set out what was to be done: the provision of hot water to a sink in the store-room and the provision of wash-hand basins in the shop in the ratio of one to every ten employees.

Regulation 68 reads as follows:

"68 (1) Any person, being a person to whom these regulations apply, who is dissatisfied with any decision or requirement of an Inspector under these regulations may appeal therefrom in writing to the Medical Officer of Health within seven days after receiving notification of the Inspector's decision or requirement. On any such appeal, the Medical Officer of Health may confirm, reverse, or modify the decision or requirement.

"(2) If on any such appeal the appellant objects to the decision of the Medical Officer of Health thereon, he may, within seven days after receiving notification of that decision, apply to a Magistrate to have his objection heard and determined. On the hearing of the application the Magistrate may make such order as he thinks fit, and every such order shall be final and binding on all parties."

The appellant appealed under Reg. 68 (1) to the Medical Officer of Health on the assumption that the letter of the Chief Inspector set out a decision or requirement of the Inspector. The form of appeal was not before me but nothing appeared to turn on it. The Medical Officer of Health replied to this appeal by a letter dated February 7, 1955, which supported the Inspector on the footing that the facilities referred to in his letter were required by the Regulations, and stated also: "I consider the appropriate sections of the Food Hygiene Regulations are enforceable as they stand without the need for any prior requisition by an Inspector, and it would appear therefore that no appeal could lie". The appellants treated this as an adverse decision of the Medical Officer of Health and applied to have their objection to the decision heard and determined by a Magistrate: that is, they made the application with which I am now dealing.

The jurisdiction of a Magistrate on such an application as this must depend on the existence of the primary right of appeal to the Medical Officer of Health. This officer was not a party to the hearing before me, but Mr. Birks appeared as *amicus curiae* to argue that on the facts of this case there was no right of appeal. He put it that the true position was that an appeal lay to the Medical Officer of Health only in respect of a decision or determination of the Inspector within the powers or discretions given to him under the Regulations.

The case was thereafter argued on the merits by counsel for the appellants and for the Inspector.

I deal first with the point raised by Mr. Birks.

It is important to bear in mind that the contest at all times has been as to whether or not the Regulations themselves made it necessary for the appellants to supply the facilities in question. According to the Inspector's interpretation the wash-hand basin was required by Reg. 19 (1) (g) and Reg. 21, and the hot water over the sink by Reg. 19 (1) (j); according to the appellants these Regulations did not apply. There was no question of the exercise by an Inspector of any discretion; in fact the Chief Inspector's letter of December 2, 1954, which was treated

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as a decision or requirement of the Inspector under the Regulations might equally appropriately have been written and signed by the Town Clerk or the City Solicitor; it is in substance a refusal by the Council to register the shop with its present facilities. If it were so treated there could be no question of an appeal, but I treat it, as it was treated in argument, as a communication from an Inspector.

The right of appeal given by Reg. 68 is in respect of "any decision" or requirement of an Inspector under these regulations". The natural and obvious meaning of these words is (a) that the Inspector has decided or required something and (b) that it is a decision or requirement which he as Inspector is empowered by the Regulations to make. There are many regulations under which matters are to be "approved", which may mean a decision by an Inspector (see Reg. 4—definition of "approved") or which otherwise involve the satisfaction of the requirements of an Inspector (e.g., Reg. 42 (c) ) or require him to decide something (e.g., Reg. 19 (1) (g) or Reg. 20) and when it appears that such regulations exist, one would expect that it is the Inspector's decisions under them which are made appealable. If the present proceedings are well-founded, that is, if there is a right of appeal where the Inspector says that the regulations apply and the appellants say they do not, it is necessary to assume that the right of appeal is much wider than this, I think wide enough to cover any instruction which may emanate from an Inspector on matters covered by the Regulations or which purport to deal with such matters. This assumption should not be made in the face of a simple and obvious construction unless there is some compelling reason to adopt it. In my opinion, there is no such reason; on the contrary the assumption involves considerable difficulties.

(1) There cannot be a right of appeal in cases where the Inspector directs a person to comply with the Regulations where there is a simple and obvious breach. The existence of a right of appeal in such a case implies that an inspector is empowered to decide that the Regulations be not enforced: or at all events that the Medical Officer of Health has a dispensing power. They have no such powers and these cases at least must be excluded as possible subjects of appeal.

(2) Neither can there be a right of appeal where an Inspector directs something to be done which is outside the Regulations. This is in direct contradiction to the words of the Regulation which gives a right of appeal against decisions or requirements, "under the regulations", not which purport to be made under the Regulations, and not in cases where the Inspector *bona fide* intends to act under the Regulations. Such a connotation is in fact given to words such as "under" or "in pursuance of" in statutes which are designed to protect, e.g., Police officers or local authorities. But statutes of that sort must be read in that way if they are to give any useful protection. It is when the actions of the person or authority intended to be protected are outside the Act that protection is required; but the natural meaning of the words is otherwise (see the remarks of *Gillies, J.*, in *Union Sash and Door Co., Ltd. v. Auckland Harbour Board* (1886) N.Z.L.R. 4 S.C. 414.)

(3) If the Inspector gives a direction which involves an interpretation of the Regulations, either a decision as to their meaning or as to their application to particular facts (as in the present case) it is easier to assume the existence of a right of appeal. But the Inspector must be either right or wrong. Either he is telling the shopkeeper to do something which the Regulations themselves prescribe, in which case

he himself is deciding or requiring nothing, or he is acting outside the Regulations. Though it may not be obvious at the time, the case must in fact be subject to the comments in (1) or (2) above. It may be said that none the less there must be a decision in such a case by someone superior in authority to the Inspector and that an appeal under Reg. 68 is a convenient way of solving the problem: but, while the Medical Officer of Health, to whom the appeal is first directed, is an appropriate authority on matters relating to health, he is not so obviously suitable on matters of interpretation.

Further, the Regulations are penal regulations: the offences are created by Reg. 8. Regulation 68 (2) provides that the Magistrate's decision is final and binding on all parties. If this relates to matters within the Inspector's discretion, there is no difficulty. But if it relates to matters of interpretation, some awkward questions arise. Is it intended that in a prosecution instituted by the Inspector a doubtful point of interpretation can no longer be argued by a defendant once it has been decided against him under Reg. 68 (2)? The disposal of a quasi-criminal charge by proof of a decision on the same facts in other proceedings seems something of a novelty. Then it would seem that a defendant who had been a successful appellant under Reg. 68 could plead the final and binding decision of a Magistrate upon a prosecution by an Inspector, but not upon a prosecution by a member of the public or by the Police, because they are not parties to the proceedings under Reg. 68. More important, would a defendant who had been unsuccessful on an appeal under Reg. 68 be debarred by that fact from appealing to the Supreme Court against a conviction on the same issue? I cannot believe that a right of appeal would be taken away so unobtrusively and so ambiguously. Then finally on this topic, these problems would arise only in cases where there had been an application to a Magistrate had a final determination under Reg. 68. If a shopkeeper had not appealed at all, one would not be concerned with any of them, though the facts might be identical with the facts in the case of another shopkeeper who had appealed.

All these difficulties are avoided if one adopts the view that the only decisions or requirements of an Inspector which can be appealed against are decisions or requirements on matters which by the Regulations are placed within his discretion. In my opinion, therefore, the present applicants had no right of appeal to the Medical Officer of Health and consequently the present application does not lie.

That is really the end of the matter so far as I am concerned. The case was argued on the merits but as it will doubtless come before this or some other Court in another form I prefer not to express any final opinion on an issue which I think is not free from doubt. However, it may be of assistance to counsel in further argument if I give some indication of my present thoughts but I make it clear that they do not represent the result of a final consideration of the problem.

(a) I think, though not without hesitation, that this shop is a delicatessen.

(b) Therefore Reg. 19 applies as well as Reg. 21. I doubt if it would if the shop were not a delicatessen.

(c) The only persons engaged in the shop are the appellants, husband and wife. The obligation as to wash-hand basins in Reg. 19 (1) (g) is related to the number of employees. It is argued that if there are no employees there need be no basins. Having regard to the purpose of the Regulations I should like to believe that "employees" means "all

"persons engaged or occupied whether masters, servants or working proprietors"; but I am not satisfied that the word is capable of this meaning. However, Reg. 21 also requires wash-hand basins in shops and here the obligation is related to "persons employed". I think that this phrase is susceptible of the wider meaning mentioned above: though, if it means this in Reg. 21, it must also mean the same thing in Reg. 19 (1) (f) relating to privies, and the result of this would be to require separate privy accommodation for the husband and wife. See the corresponding sections of the Shops and Offices Act, 1921-22 (s. 50), and of the Factories Act, 1946 (s. 59), which make provision for this situation.

(d) The shop in this case has living quarters attached, and the appellants and their family live there. It was submitted for the appellants that the wash-hand basin in the bathroom should satisfy Reg. 19 (1) (g) (if it applied) and Reg. 21, and that the kitchen sink was adequate provision under Reg. 19 (1) (j). No authority was cited as to the meaning of the words "provided with" in Reg. 19 (1) (g) and Reg. 21 and "adequate provision" under Reg. 19 (1) (j). I am inclined, in the absence of authority, to think that it was not intended that the persons working in the premises should necessarily have the exclusive use of the required conveniences or facilities. It is common knowledge that this is not the way the word "provided" is interpreted in the corresponding provision in the Shops and Offices Act, 1921-22 (s. 50), where one set of conveniences is very frequently used by a number of offices. I am inclined also to think that each case of the present type is to be considered on its own facts; that, where a shop and living quarters form part of one structure, facilities in the living quarters may, in some cases (but not in all), be considered to be adequate provision for the adjoining shop. In this case my impression is that the wash-hand basin in the bathroom should not be regarded as sufficient for the shop but that the sink in the kitchen is a sufficient provision for washing utensils under Reg. 19 (1) (j).

However, as I have said, these observations are not fully considered and are not to be taken as matters of decision.

*Application dismissed.*

Solicitors for the applicant: *Atkinson, Dale, Mather and Watterson* (Wellington).

Solicitor for the Wellington City Corporation: *City Solicitor* (Wellington).

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— Construction — Auckland Harbour Bridge Act, 1950—"Claim against Authority for Compensation—"Fair commercial value"—No Right to "compensation for loss of goodwill"—Matters to be determined by Commission in assessing Compensation—"Goodwill"—Auckland Harbour Bridge Act, 1950, s. 68 (1) (a), (3).

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8. ——— Offences—Carrying on Unlicensed Goods-service—Carriage of Goods by Heavy Motor-vehicle—Exceptions—Test to be applied—"Goods-service"—Transport Act, 1949, s. 96.

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- "Certificate of fitness as hereinafter provided" - - - - M.C. 91  
*See TRANSPORT. 2.*
- "Compensation for loss of good will" - S.C. 181  
*See STATUTE.*
- "Controlling Authority" - - M.C. 49  
*See TRANSPORT. 4.*
- "Damage done" - - - - L.V. Ct. 139  
*See PUBLIC WORKS. 2.*
- "Decision" - - - - M.C. 192  
*See PUBLIC HEALTH. 2.*
- "Dismissal" - - - - S.C. 149  
*See TRAMWAYS. 1.*
- "District of any borough" - - S.C. 59  
*See TRANSPORT. 5.*
- "Due consideration to the safety and convenience of other road users" - S.C. 120  
*See TRANSPORT. 14.*
- "Dwellinghouse" - - S.C. 46; C.A. 96  
*See RATES AND RATING. 8.*
- "Ended" - - - - S.C. 411  
*See TENANCY.*

## WORDS AND PHRASES—continued.

- "Exclusively or principally for agricultural purposes" - - - - M.C. 128  
*See RATES AND RATING. 4.*
- "Expenditure" - - - - S.C. 113  
*See PUBLIC REVENUE.*
- "Fair commercial value" - - S.C. 181  
*See STATUTE.*
- "For hire or reward" - - - S.C. 387  
*See TRANSPORT. 3.*
- "For the use, enjoyment, or recreation" - S.C. 89  
*See PUBLIC RESERVE.*
- "Goods-service" - - - - S.C. 387  
*See TRANSPORT. 3.*
- "Goods-service" - - - - M.C. 62  
*See TRANSPORT. 8.*
- "Goodwill" - - - - S.C. 181  
*See STATUTE.*
- "Hereinafter provided" - - M.C. 91  
*See TRANSPORT. 2.*
- "In itself (and without any reference to any other part of the work) causes damage" - L.V. Ct. 139; S.C. & C.A. 232  
*See PUBLIC WORKS. 2.*
- "Intersection" - - - - S.C. 153  
*See TRANSPORT. 10.*
- "Keep" - - - - M.C. 124  
*See BY-LAW. 2.*
- "Leave" - - - - M.C. 119  
*See TRANSPORT. 11.*
- "Leave a motor-vehicle in any road during the hours of darkness" - M.C. 119  
*See TRANSPORT. 11.*
- "Loss" - - - - S.C. 113  
*See PUBLIC REVENUE.*
- "Materially prejudiced" - - S.C. 366  
*See LIMITATION OF ACTION. 2.*
- "Navigable" - - - - S.C. & C.A. 414  
*See RIVER.*
- "Necessary preliminary steps" - S.C. 20  
*See ELECTRIC-POWER BOARD.*
- "Not of the same or similar character" - M.C. 135  
*See TOWN-PLANNING. 5.*
- "Not materially prejudiced" - S.C. 366  
*See LIMITATION OF ACTION. 2.*
- "NP" - - - - S.C. 470  
*See TRANSPORT. 16.*



WORDS AND PHRASES—*continued*.

- "Occupier" - - - - - M.C. 3  
See RATES AND RATING. 1.
- "Occupier" - - - - - M.C. 83  
See LAND SUBDIVISION IN COUNTIES.  
3.
- "Officer" - - - - - M.C. 23  
See FOOD AND DRUGS.
- "Owner" - - - - - M.C. 83  
See LAND SUBDIVISION IN COUNTIES.  
3.
- "Parking" - - - - - M.C. 34  
See TRANSPORT. 13.
- "Person selling" - - - - - M.C. 23  
See FOOD AND DRUGS.
- "Pieces of land" - - - - - M.C. 174  
See RABBIT DESTRUCTION.
- "Practicable" - - - - - M.C. 148  
See TRANSPORT. 12.
- "Price" - - - - - L.V. Ct. 158  
See LAND VALUATION. 7.
- "Proposed road" - - - - -  
See LAND SUBDIVISION IN COUNTIES.  
2.
- "Public interest" - - - - - M.C. 36  
See LAND SUBDIVISION IN COUNTIES.  
4.
- "Public interest" - - - - - M.C. 83  
See LAND SUBDIVISION IN COUNTIES.  
3.
- "Rateable value" - - - - - M.C. 184  
See RATES AND RATING. 7.
- "Reasonable excuse" - - - - - S.C. 10  
See MUNICIPAL CORPORATION. 5.
- "Residential district" - - - - - M.C. 135  
See TOWN PLANNING. 5.
- "Road" - - - - - S.C. 153  
See TRANSPORT. 10.
- "Road widening" - - - - - S.C. 87  
See LAND SUBDIVISION IN COUNTIES.  
2.

WORDS AND PHRASES—*continued*.

- "Some neighbouring house" - - - - - S.C. 228  
See LICENSING. 3.
- "Suffer to be deposited or to accumulate  
" . . . rubbish" - - - - - S.C. 84  
See BY-LAW. 1.
- "Suffers" - - - - - S.C. 94  
See BY-LAW. 1.
- "Thereon" - - - - - L.V. Ct. 139  
See PUBLIC WORKS. 2.
- "Three pounds" - - - - - M.C. 108  
See LOCAL ELECTIONS AND POLLS.
- "To have for sale daily sufficient pasteurized  
" milk as is asked for" - - - - - S.C. 128  
See MILK.
- "Town-planning principles" - - - - - S.C. 132  
See TOWN-PLANNING. 2.
- "Urban farm land" - - - - - M.C. 101  
See RATES AND RATING. 5.
- "Use" - - - - - S.C. 89  
See PUBLIC RESERVE.

## WORKERS' COMPENSATION.

1. — Accident Arising Out of and in the Course of Employment—Tuberculosis—Worker employed by Hospital Board—Presumption of having contracted Tuberculosis while so employed—Duties or Classes of Duties prescribed by Regulations declaratory of Class of Persons to whom Presumption applies—Worker entitled to Compensation—Date from which Presumption operates—Workers' Compensation Act, 1922, s. 10—Tuberculosis Act, 1948, s. 23 (2)—Tuberculosis Regulations, 1949 (Serial No. 1949/138), Reg. 19.

FARRELL v. NORTH CANTERBURY HOSPITAL BOARD - - - - - C.A. 29

2. — Statutory Indemnity of Uninsured Employers—Any Statutory Extension of Scope of Employment Extending Area of Obligation of Workers' Compensation Board in Respect of Workers' Compensation Claims and at Common Law—Workers' Compensation Amendment Act, 1950, s. 9.

WORKERS' COMPENSATION BOARD v. MARAKI - - - - - S.C. & C.A. 397